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NO. 92-1348

Supreme Court, U.S.
FILED
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In the
Supreme Court of the United States

OCTOBER TERM, 1993

RAPIDES REGIONAL MEDICAL CENTER,
Petitioner

VERSUS

ANTHONY J. PRINCIPI,
ACTING SECRETARY OF VETERANS AFFAIRS,
AND
ST. FRANCES CABRINI HOSPITAL,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. THE QUESTIONS PRESENTED FOR REVIEW

The Competition in Contracting Act ("CICA"), 41 U.S.C. § 253(a) requires all federal agencies to use "full and open competition" when procuring property or services, except [so far as applicable here] for procurement procedures "otherwise expressly authorized by statute." The narrow question presented in this case is:

> Whether the Department of Veterans Affairs (VA) may employ secretive sole-source contracting to enter a joint acquisition agreement involving the procurement of both property and services under a statute (38 U.S.C. § 8153) that contains *no* procurement *procedures* and is *silent* as to the requirements for competition.

The broader sub-issues present include:

1. Whether the decision below, in a case of first impression in the Circuits, severely undermines important Congressional and public policy in favor of full and open competition by (a) effectively reversing the presumption in favor of competition found in the CICA and (b) finding as "controlling" a self-exempting agency regulation when the law requires *express* exemption *by statute*?

2. Whether the 5th Circuit's decision below is directly contrary to this Court's holding in *In Re: Endo*, 65 S.Ct. 208 (1944) and its progency, by using appropriations and reporting legislation to *imply* satisfaction of the substantive congressional requirement for *express statutory* exemption from competition?

3. Whether the decision below is directly contrary to this Court's holding in *Andrus v. Glover Construction Co.*, 100 S.Ct. 1905 (1980), by finding exceptions to a law of general prohibition through mere implication, where Congress has required the exception to be *expressly* set forth by *statute*?

II. LIST OF ALL PARTIES

Petitioner:	Rapides Regional Medical Center (Rapides General Hospital)
Respondents:	Anthony J. Principi, Acting Secretary of Veterans Affairs
	Department of Veterans Affairs
	St. Francis Cabrini Hospital

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V. REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

Rapides Regional Medical Center v. Derwinski, 783 Supp. 1006 (W.D. La. 1991).

Rapides Regional Medical Center v. Derwinski, 974 F.2d 565 (5th Cir. 1992), *rehearing denied* 979 F.2d 211 (1992).

VI. JURISDICTION OF THE COURT

The jurisdiction of this Honorable Court is established by 28 U.S.C. § 2101(c). Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on November 13, 1992.

VII. THE APPLICABLE STATUTES

1. 41 U.S.C. § 253(1)-(2):

> (1) Except as provided in subsections (b), (c), and (g) of this section and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services —
>
> > (A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this subchapter and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984 [41 U.S.C.A. § 403 note]; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedures appropriate under the circumstance, an executive agency —

(A) shall solicit sealed bids if —

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

2. 38 U.S.C. § 8153:

(a) To secure certain specialized medical resources which otherwise might not be feasibly available, or to effectively utilize certain other medical resources, the Secretary may, when the Secretary determines it to be in the best interest of the prevailing standards of the Department medical care program, make arrangements, by contract or other form of agreement,

as set forth in clauses (1) and (2) below, between Department health-care facilities and other health-care facilities (including organ banks, blood banks, or similar institutions), research centers, or medical schools:

(1) for the mutual use, or exchange of use, of specialized medical resources when such an agreement will obviate the need for a similar resource to be provided in a Department health care facility; or

(2) for the mutual use, or exchange of use, of specialized medical resources in a Department health care facility, which have been justified on the basis of veterans' care, but which are not utilized to their maximum effective capacity.

(b) Arrangements entered into under this section shall provide for reciprocal reimbursement based on a methodology that provides appropriate flexibility to the heads of the facilities concerned to established an appropriate reimbursement rate after taking into account local conditions and needs and the actual costs to the Government received therefrom shall be credited to the applicable Department medical appropriation and to funds that have been allotted to the facility that furnished the resource involved.

* * *

(e) The Secretary shall submit to the Congress not more than 60 days after the end of each fiscal year a report on the activities carried out under this section. Each report shall include—

(1) an appraisal of the effectiveness of the activities authorized in this section and the degree of cooperation from other sources, financial and otherwise; and

(2) recommendations for the improvement or more effective administration of such activities.

VIII. STATEMENT OF THE CASE

The Competition in Contracting Act, 41 U.S.C. § 253(a) requires all federal agencies to use "full and open competition" when procuring property or services, except [so far as applicable here] for procurement procedures "otherwise expressly authorized by statute." The question presented in this case is whether the Department of Veterans Affairs (VA) may employ secretive sole-source contracting to enter a joint acquisition agreement involving the procurement of both property and services under a statute (38 U.S.C. § 8153) that contains *no* procurement *procedures* and is *silent* as to the requirements for competition.

A. Facts

On February 8, 1990, the Veterans Affairs Medical Center, Alexandria, Louisiana ("VAMC") submitted a proposal ("VAMC-Cabrini agreement") to the Department of Veterans Affairs ("VA") for participation with a private hospital, St. Francis Cabrini Hospital ("Cabrini"), in the 1990 Advanced Technology Medical Equipment Shared Acquisition Program ("Sharing Program") for the joint purchase and shared use of a state-of-the-art 20 MEV dual energy linear accelerator ("accelerator").[1] *VAMC contacted only Cabrini* concerning participation in the Sharing Program, although petitioner, Rapides Regional Medical Center ("Rapides"), was then providing VA with virtually identical equipment and services.

The VAMC-Cabrini agreement consisted of the following inter-dependent components:

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[1] Linear accelerators provide radiation therapy to cancer patients. Rapides currently has a 6 MEV and an 18 MEV accelerator. Cabrini has a 6 MEV accelerator. For years, Rapides has provided VAMC patients with radiation therapy service, most recently under contracts for 6 MEV services awarded following competition between Rapides and Cabrini.

(a) A Letter of Intent between VAMC and Cabrini (Reproduced @ *Appendix D* @ A-30);

(b) A Memorandum of Understanding between VAMC and Cabrini ("VAMC-Cabrini MOU") (Reproduced @ *Appendix E* @ A-34);

(c) A proposed Sharing Agreement; and

(d) A cost analysis for an accelerator.

Under the VAMC-Cabrini agreement, the parties adopted a single course of action, the purpose of which was to procure equipment jointly and to provide for the rendition of patient services with that equipment.

To permit acquisition, Cabrini initially "donated" to VAMC an amount equal to one-half of the value of the accelerator (approximately $750,000.00), the *minimun* permissible contribution under the Sharing Program.[2] The accelerator is owned by VAMC, but is installed at Cabrini[3] and will be operated by Cabrini's medical staff. Additionally, VAMC is obligated to enter into a Sharing Agreement with Cabrini governing the joint use and operation of the accelerator under which Cabrini will receive cost credits for servicing VAMC patients.

As early as February, 1990, and on numerous occasions thereafter, Rapides contacted officials at VAMC and at the VA concerning the VAMC-Cabrini proposal seeking to learn the facts and if competition was permissible, and objecting to the introduction of unnecessary duplicative

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[2] See "Letter of Intent" ¶ 2(D), at *Appendix D.*

[3] Cabrini constructed a multi-million dollar building on its premises to house the VAMC's accelerator. Because Rapides already has the facilities to house and staff a large accelerator, if given the opportunity, it could have focused its participation into the funding portion of the proposal and thereby offered an amount greater than the *minimun donation* offered by Cabrini.

medical technology. Complete and truthful responses were not forthcoming, and on each occasion, Rapides' questions and concerns were deflected, denied, or falsely represented.

Although it still did not know exactly what the agreement was, and had been unable even to obtain a copy of the VAMC-Cabrini proposal documents, Rapides filed an appeal with the General Accounting Office ("GAO") protesting the sole-source VAMC-Cabrini agreement on the grounds that VAMC violated the Competition in Contracting Act of 1984 ("CICA"), 41 U.S.C. § 251, et seq., by failing to solicit a competitive proposal from Rapides. Without reaching substantive issues, the GAO rejected the protest as untimely. *Rapides Regional Medical Center,* No. B-242601, 91-1 C.P.D. ¶ 159 (February 12, 1991). Following a request for reconsideration, the GAO dismissed Rapides' protest on June 28, 1991. *Rapides Regional Medical Center — Reconsideration,* No. B-242601.2, 91-1 C.P.D. ¶ 614 (June 28, 1991).

B. Course Of Proceedings And Disposition Below.

1. *The District Court.*

On July 29, 1991, Rapides filed suit against VA seeking declaratory and injunctive relief. Rapides sought to permanently enjoin the VAMC-Cabrini agreement in its entirety on the basis that VAMC failed to use competition in soliciting proposals as mandated by CICA. Prior to final submission of the case, the VA stipulated that:

> (1) The Department of Veterans Affairs ("VA") did not employ competitive procedures under the Competition In Contracting Act of 1984 in connection with its execution and approval of the Letter of Intent and Memorandum of Understanding entered into with St. Francis Cabrini Hospital ("Cabrini"); [and]

(2) Because it did not believe that it was required by law, VA did not request a competitive proposal from Rapides Regional prior to its entering into the Letter of Intent with Cabrini for submission under the 1990 Advanced Medical Equipment Shared Acquisitions Program.

On December 3, 1991, the District Court held that the VAMC-Cabrini agreement violated CICA and permanently enjoined its execution. 783 F.Supp. 1006 (W.D. La. 1991) (Little, J.). Reproduced @ *Appendix B* @ A-23. Rather than wade unnecessarily through the history of the VA's sharing authority, 38 U.S.C. § 8153 (formerly § 5053) ("§ 8153"), the district court relied on the very clear language of CICA, stating

> [t]his Court . . . cannot discern any implicit, let alone express provision waiving the application of the Competition in Contracting Act. The plain language doctrine controls our interpretation of a statute. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed. 2d 842 (1990). The plain and compelling reading of the Competition in Contracting Act is that its public bid provisions are applicable unless an enabling act created by another statute expressly excludes the application of the Competition in Contracting Act.

Id., @ 1008. *Appendix B*, @ A-26-27. The district court also summarily rejected the VA's argument that its own self-exempting regulation, 41 C.F.R. § 808.302-5(B), satisfied CICA's rquirement that exemption be "expressly authorized by statute." According to the district court

> Congress said that the public bid law can be circumvented by express language contained in a statute. The regulation from the Veterans Administration is not a statute. Congress created

> the measuring stick and retained the power to delete public bid law requirements from contracts for goods or services. The VA is powerless to change the clear procedures set by Congress.

Id., @ 1008. *Appendix B,* @ A-27.

Federal subject matter jurisdiction in the court of first instance was based on 28 U.S.C. § 1331 and 31 U.S.C. § 3556.

2. *The Court of Appeals.*

In an opinion filed on September 24, 1992, a panel of the United States Court of Appeals for the Fifth Circuit (Judge Jones, joined by Judge Goldberg and Judge DeMoss) vacated the permanent injunction, validating the VAMC-Cabrini agreement and authorizing the VA to continue conducting its yearly multi-million dollar sharing programs without regard to competition. 974 F.2d 565 (5th Cir. 1992) Reproduced @ *Appendix A,* @ A-1.

The court of appeals specifically held that

> [i]n view of the plain language of § 8153, its pre-CICA legislative history, and the 1985 appropriations legislation expanding the existing sharing program (and which 48 C.F.R. § 808.302-5(b) was intended to implement), it must be concluded that the VA's sharing program is expressly authorized by statute within the meaning of CICA § 253(a)(1) and therefore does not trigger the Act's full and open competition requirements.

Appendix A, @ A-22. The court further indicated, although it did not specifically hold, that the VAMC-Cabrini agreement was not a procurement contract subject to CICA.

On November 13, 1992, the court denied Rapides'

petition for rehearing and suggestion for rehearing en banc. 979 F.2d 211 (5th Cir. 1992) Reproduced @ *Appendix C*, @ A-28. On December 8, 1992, the court denied Rapides a stay of the mandate pending review on writ of certiorari to this Court.

IX. ARGUMENT AND AUTHORITIES

A. Propriety Of Review On Writ Of Certiorari.

The Court may exercise its discretionary jurisdiction to grant review on writ of certiorari only for "special and important reasons." Sup. Ct. R. 10. The Court does not exercise that discretion simply "for the benefit of the particular litigants," and does so only when the issues presented are "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955). The case at bar presents the requisite special and important reason for review.

The decision by the court of appeals violates the clear language of CICA and is in diametrical opposition to every principle on which the statute was based.[4] By relying on historical reference and implication to find express statutory authority to sole-source procure, the decision effectively relegates the public interest to its pre-CICA back seat by reversing the presumption in favor of competition. The decision harms not only Rapides, but damages both the country's collective interest in the proper management of the public fisc and the interest of every individual to fair treatment when competing for government contracts.

The "special and important reasons" for demanding compliance with the procurement statutes prompted the Court to grant writ of certiorari in *Andrus v. Glover Construction Company*, 446 U.S. 608, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980).[5] In that case, the Court unanimously

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[4] See discussion of CICA legislative history, *infra.*, @ 8 - 11.

[5] Certiorari granted at 446 U.S. 962, 100 S.Ct. 448, 62 L.Ed.2d 374, "to

held that, notwithstanding alleged sole-source authority in a competing statute,[6] the Bureau of Indian Affairs must "adhere to the broad statutory mandate that 'all purchases and contracts for property and services shall be made by advertising . . ..' "[7] As in the case at bar, the challenged agency offered several strained interpretations of its statutory procurement authority. The Court rejected those arguments in light of the certain requirement for competition.[8]

The "special and important reasons" underlying the Court's review of *Glover Construction* are much more pronounced in the case at bar. First, unlike *Glover Construction*, the court of appeals decision at issue undermines the public interest by silencing, rather than effectuating, the "broad statutory mandate" for competition.[9] Second, since *Glover Construction* Congress enacted CICA to assure and compel adherence to its mandate for the use of competition in government procurement. Third, there is no competing statute that *expressly* authorizes sole-source procurement, as existed in *Glover Construction*. Finally,

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Footnote continued.

decide a question of importance in the proper exercise by the BIA (Bureau of Indian Affairs) of its procurement responsibilities." 446 U.S., @ 612, 100 S.Ct., @ 1908.

[6] 25 U.S.C. § 47.

[7] 446 U.S., @ 615, 100 S.Ct., @ 1909, *citing* 41 U.S.C. § 252(c) (amended 1984 by CICA).

[8] The court further noted that "nothing in the legislative history of . . . the FPASA (amended 1984 by CICA) points in a different direction than does the plain language of the statute." 446 U.S., @ 617 n. 18, 100 S.Ct., @ 1910 n.18.

[9] In *Glover Construction*, the court of appeals correctly observed "that a primary, significant remedial feature of the advertisement and competitive bidding requirements . . . is to obtain the best and lowest bid for the benefit of American taxpayers. . .." 591 F.2d 554, 562 (10th Cir. 1979).

there can be no serious dispute that during the last twelve years the public's interest in government spending generally, and in the spiralling cost of health care in particular, has dramatically increased.[10] Left unchallenged, the decision is an invitation to the same sole-source shenanigans in public contracting that permitted pre-CICA procurement practices to make a joke of the preference for competition. Review is important, appropriate and necessary.

B. The Competition In Contracting Act Of 1984.

According to the Office of Federal Procurement Policy Act of 1974, 88 Stat. 796, 41 U.S.C. § 401 et seq., (amended 1988), it is the policy of the United States Government in procurement "to promote economy, efficiency, and effectiveness." The Federal Property and Administrative Services Act of 1949 ("FPASA"), 40 U.S.C. § 474, et seq., and 41 U.S.C. § 251 et seq. (amended 1984 by CICA), provides the statutory framework by which that policy is carried out.

Prior to 1984, the FPASA required that "[a]11 purchases and contracts for property and services shall be made by advertising. . .." 41 U.S.C. § 252(c) (amended 1984). At that time, there were fourteen specific exceptions[11] and one general exception which allowed sole-source contracting that was "otherwise authorized by law." 41 U.S.C. § 252(c)(15) (amended 1984).

Following a careful review of agency compliance with the FPASA's procedures, Congress determined that prior to 1983 a majority of federal procurement was achieved by noncompetitive means to the detriment of the public fisc.

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[10] According to the legislative history of the Office of Federal Procurement Policy Act of 1988, federal procurement grew from a 57.5 billion dollar a year "policy issue" in 1972, to a **200 billion dollar a year** "policy issue" in 1988. S. Rep. No. 424, 100th Cong., 2nd Sess. 134, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5687, 5690.

[11] 41 U.S.C. § 252(c)(1)-(14) (amended 1984).

S. Rep. 50, 99th Cong., 2nd Sess. 130, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2174 ("*Senate Report*"). In fact, during fiscal year 1982 more than half of all government contracts were awarded on noncompetitive, sole-source, basis. *Id.*, @ 2180.

The Senate Governmental Affairs Committee assumed jurisdiction over procurement issues during the 98th Congress. *Id.*, @ 2181. Evidence presented to that Committee revealed several fundamental reasons for the government's "over-reliance on sole-source contracting." *Id.*, @ 2182. In part, the Committee determined that "the [existing] procurement statutes [were] inadequate," and that "the exceptions providing for negotiation [were] used inappropriately, in some cases, to justify sole-source procurement." *Id.* The Committee concluded that the "evidence of unnecessary sole-source contracting [was] so compelling that permanent reforms in the procurement statutes" were necessary. *Id.*, @ 2202.

In response, Congress enacted the Competition in Contracting Act of 1984 ("CICA") to replace the FPASA's procurement procedures. Under CICA, agencies are required to obtain "full and open competition" when procuring private property or services. 41 U.S.C. § 253(a).[12]

According to legislative history, the "purposes" of CICA are: (1) to establish a "statutory preference" for the use of competitive procedures; (2) to impose restrictions on noncompetitive contracts; and (3) to permit federal agencies to use the competitive method most conducive to the conditions of the contract. *Senate Report*, @ 2174.

CICA identifies seven, as reduced from FPASA's

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[12] "Full and open competition is accomplished only when (1) all qualified vendors are allowed and encouraged to submit offers on federal procurements and (2) a sufficient number of offers is received to insure that the government's requirements are filled at the lowest possible costs." H.R. Rep. No. 1157, 98 Cong. 2nd Sess. 17 (1984).

fourteen, specific circumstances warranting non-competitive procurement. 41 U.S.C. § 253(c). None are applicable to the present case. The only other exception is for procurement procedures "otherwise expressly authorized by statute." *Id.*,§ 253(a). That particular exception replaced the FPASA's former "otherwise authorized by law" exception which had proved to be one of the most abused.[13] By closing the "authorized by law" loophole, CICA expressly ended the use of regulatory exemptions. According to the Committee, under CICA **"the award of a contract on a sole-source basis would for the first time constitute a clear violation of statute unless permitted by one of the statutes."** *Senate Report*, @ 2194 (emphasis added).

Finally, CICA's legislative history identifies three specific benefits derived by the government as a result of competitive procurement. "First, competition in contracting saves money." *Id.*, @ 2175. Second, "competition curbs cost growth." *Id.*, @ 2176. "The last, and possibly the most important, benefit of competition is its inherent appeal of 'fair play.' " *Id.* The emphasis on fair play achieved through competition is important in maintaining "the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism." *Id.*

In the instant case, no competitive procedure was utilized. Consequently, the VA forfeited its opportunity to save money, to cut cost growth and, most importantly, to maintain "integrity in the expenditure of public funds."

The opinion at issue is the most authoritative circuit decision to address the scope of CICA. Yet, its rationale is directly contrary to CICA's clearly defined Congressional objectives and, in many respects, dangerously reverses the statutory presumption in favor of competition by: (1)

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[13] For instance, during fiscal year 1982, "the Department of Energy used the 'otherwise authorized by law' exception . . . to justify over 73 percent of its non-competitive procurements." *Senate Report*, @ 2184.

relying on legislative history and VA use history to find express statutory authority, when no statute nor legislative passage mentions the use of competition; (2) equating a grant of authority to procure with a procurement procedure; (3) relying on post-CICA appropriations legislation as express statutory authority, when the appropriations measures does not mention the use of competition; (4) finding a VA self-exempting regulation "controlling"[14]; (5) suggesting that CICA has to be "trigger[ed]"[15], or incorporated on a Congressional "revisit"[16]; (6) finding that a year end reporting requirement justifies the avoidance of, and eliminates the need for, competition; and (7) suggesting that CICA applies only to "classic"[17] procurement arrangements, when the statute was expressly enacted to permit greater flexibility in government contracting.

C. The Court of Appeals' Holding That Sole-Source Agreements Are Expressly Authorized By 38 U.S.C. § 8153 Is Incorrect. The Decision Is Based On Serious And Material Errors Of Law And Fact And Effectively Reverses CICA's Presumption In Favor Of Competition.

1. The History Of The Sharing Program Cannot Provide The Requisite Express Statutory Exemption.

The decision by the court of appeals completely disregards the plain meaning doctrine on which the district court properly relied.[18] According to Congress, under CICA "the award of a contract on a sole-source basis . . .

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[14] 974 F.2d, @ 575. *Appendix A*, @ A-21.

[15] 974 F.2d, @ 575. *Appendix A*, @ A-22.

[16] 974 F.2d, @ 574. *Appendix A*, @ A-19.

[17] *Id.*

[18] 783 F.Supp., @ 1008, *citing Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990).

constitute[s] a clear violation . . . unless permitted by one of the statutes." *Senate Report*, @ 2194 (emphasis added). No statute expressly authorizes the sole-source creation of a shared acquisition agreement. The court of appeals' reliance on an inaccurate history of the sharing program and Congressional silence is grossly misplaced in the face of CICA's absolutely certain statutory mandate for competition.

a. The finding that the sharing program was created and maintained by Congress on a sole-source basis is inaccurate and irrelevant.

The court of appeals' decision was premised in part on the inaccurate and conflicting conclusion that "the Sharing Program (38 U.S.C. § 8153 [formerly § 5053]) as enacted by Congress was not subject to competitive procurement requirements," 974 F.2d @ 574, *Appendix A*, @ A-20, n. 22, and that "Congress had created and maintained that program by means other than full and open procurement." *Id.*, @ A-21. Those conclusions are at odds with the court's own factual summary and are irrelevant to the issue of express statutory authority.

First, § 8153 has never provided an exclusion from competition, as expressly recognized by the Court. Second, if VA did maintain the Sharing Program on a sole-source basis prior to 1983, then VA was in direct violation of its owns regulations.[19] Finally, pre-CICA history of the

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[18] 783 F.Supp., § 1008, citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990).

[19] Prior to 1983, VA regulations clearly subjected § 8153 Sharing Agreements to competition. 48 C.F.R. § 8-3.204. See *Matter of: Metropolitan Radiology Associates, Chartered:* No. 195559, 80-1 CPD,

Sharing Program is completely irrelevant since CICA evidences overwhelming Congressional intent to drastically change the procurement system that existed prior to 1984. According to the Senate Committee:

> The Committee believes that *stronger safeguards* are needed in the statutes against superfluous sole-source contracting. *Senate Report,* @ 2183-84 (emphasis added).
>
> * * *
>
> The evidence of *unnecessary sole-source contracting* is so compelling that permanent reforms in the procurement satutes must be implemented. *Id.,* @ 2202 (emphasis added).
>
> * * *
>
> The objective, conceptually, is to establish an *absolute preference for competition* and, practically, to provide more flexibility in contracting. *Id.,* @ 2190 (emphasis added).
>
> * * *
>
> Within [CICA's] statutory framework, executive agencies are [now] required to use competitive procedures **whenever possible** in awarding federal contracts for property and services. *Id.,* (emphasis added).

Obviously, Congress intended to dramatically change the status quo in government procurement. Pre-CICA sole-source history is irrelevant.

b. Post-CICA Congressional inaction cannot create exemption from CICA.

The court of appeals erred in relying on post-CICA

Footnote continued.

p. 265 (April 9, 1980) and *Matter of: Veterans Administration,* No. 195559.2, 81-2 CPD, p. 369 (November 2, 1981), which specifically held that VA regs prior to 1983 under § 8153 required competition.

Congressional inaction as implied authorization or justification for the VA's avoidance of CICA. According to the court, "Congress evidently saw no reason to revisit § 8153 after CICA's enactment because the sharing program had historically been operated on a sole-source basis." 974 F.2d, @ 574-575. *Appendix A*, @ A-20, A-25.

The court's boot-strap rationale impermissibly suggests that CICA must be specifically incorporated by reference to statutes granting procurement authority.[20] Obviously, CICA applies unless excluded. Compare, for example, Congress' 1986 "revisit" of 38 U.S.C. § 8109, during which Congress specifically changed the language of the statute to permit the VA to contract for parking facilities "without regard to laws requiring full and open competition." 38 U.S.C. § 8109.

Additionally, Congressional silence cannot ratify conduct that is in violation of an express Congressional directive. In *Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978) (Rehnquist, J.), the SEC claimed authority to issue a series of summary orders suspending trading beyond the 10-day limitation imposed by 15 U.S.C. § 781(k) (1976 ed.). For 34 years the SEC had acted on its interpretation of the statute without Congressional disapproval.

The Court refused to grant deference to the SEC's interpretation because of the "clear contrary indications of the statute itself." 436 U.S., @ 117, 98 S.Ct., @ 1711.[21]

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[20] This obviously incorrect premise is further advanced by the court's inexplicable statement that the sharing program "does not *trigger* the Act's full an open competition requirement." 974 F.2d., @ 575. *Appendix A*, @ A-22. (emphasis added).

[21] "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unam-

The Court also rejected the SEC's claim that Congress had tacitly ratified its interpretation of the statute. In spite of specific evidence that Congress was aware of the SEC's practice,[22] the court concluded:

> [w]e are extremely hesitant to presume general Congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee report, without additional indication of more widespread Congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here, *its invocation would result in a construction of the statute which* not only *is at odds with the language of the section in question and the pattern of the statute taken as a whole,* but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency.

436 U.S., @ 121, 98 S.Ct., @ 1713 (emphasis added).

In the instant case, unlike in *Sloan*, there is not a

Footnote continued.

biguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842 - 843, 104 S.Ct. 2778, 281 - 282, 81 L.Ed.2nd 694 (1984). See also *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 837, 103 S.Ct. 1587, 1595, 75 L.Ed.2nd 580 (1983), (GAO's long standing interpretation of its access-to-records authority rejected as inconsistent with express statutory language).

[22] The Court acknowledged that "[n]ot only has Congress re-enacted the summary suspension power without disapproving the Commissioner's construction, but the Commission participated in the drafting of much of this legislation and on at least one occasion made its use known to Congress in committee hearings. Furthermore, at least one committee indicated on one occasion that it understood and approved of the commission's practice." 436 U.S., at 121, 98 S.Ct., at 1713.

single "isolated statement" in legislative history indicating that Congress was aware that the VA was procuring on a sole-source basis under 38 U.S.C. § 8153. Moreover, the opinion's construction of the statute is squarely "at odds" with CICA. The court of appeals erred in relying on Congressional inaction as authority or justification for VA's avoidance of CICA.

2. *38 U.S.C. § 8153 Provides No "Procurement Procudures" And No Exemption From Competition.*

The court of appeals erred in holding that VA's sharing program is exempted from CICA simply because that program is expressly authorized by 38 U.S.C. § 8153. The decision completely silences CICA by equating *authority to procure* with a procurement *procedure*, thus exempting from competition every authorized procurement.[23]

CICA does not authorize procurement. Rather, CICA specifies the procurement *procedures* which must be employed when acting on the authority to procure granted elsewhere.[24] § 8153 grants the VA the *authority* to procure. It does not set forth procurement *procedures*, competitive or otherwise. The VA expressly recognized this undeniable fact in its pre-1986 regulations, by stating:

> Various sections of title 38, United States Code, authorize the Administrator to enter into con-

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[23] Even assumning that § 8153 can be read to authorize procurement procedures, the district court correctly noted that "to suggest that 41 U.S.C. § 253(a)(1) could be read to eliminate this bid requirement in every case in which a statute creates procurement procedures strains statutory construction beyond the plain import and impact of the English language. To support such a construction would lead to absurd consequences." 783 F.Supp., @ 1008. *Appendix B*, @ A-27.

[24] 41 U.S.C. § 11 provides that "[n]o contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment."

> tracts or agreements for the purpose of acquiring personal or professional services. *These authorizations do not, however, stipulate the manner in which such contracts or agreements are to be entered into, i.e., negotiation or formal advertising.*

35 Fed. Reg. 13,366 (emphasis added). While the VA removed this language from its regulations in 1986, no evidence indicates subsequent *Congressional* intent to exclude competitive procurement *procedures* post-CICA. In fact, Congress has remained silent regarding procurement *procedures* throughout the history of the Sharing Program.

There are numerous statutes similar to § 8153 which grant executive agencies *authority* to procure, but which do not specify procurement *procedures*.[25] Those statutes do not authorize *sole-source* procurement simply because they expressly authorize procurement. By comparison, the Brooks Act, 40 U.S.C. § 541 et seq., which is cited in the CICA legislative history as an example of procurement procedures "otherwise" authorized by statute, *Senate Report*, @ 2190, indentifies specific *procedures* for procuring architectural or engineering services.

Unlike the Brooks Act, § 8153 and each of the noted statutes are completely silent regarding procurement *pro-*

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[25] *E.g.*: 38 U.S.C. § 1703 authorizes the VA to contract with non-Department facilities for hospital care and medical services; 38 U.S.C. § 8103 authorizes the VA to contract with private entities for the purpose of constructing, altering or acquiring medical facilities; 38 U.S.C. § 8123 authorizes the VA, "to the extent . . . necessary," to procure by lease, purchase, or construction space for administrative purposes; 38 U.S.C. § 8125 authorizes the VA to procure health-care-items by contract under certain limited conditions; and 38 U.S.C. § 513 authorizes the Secretary of the VA, if in his judgment "such arrangements are in the interest of efficiency and economy," to enter contracts for passenger motor vehicles and aircraft for official travel.

cedures. There is no specific procurement procedure inherent in § 8153 merely because it authorizes reimbursement "arrangements" based generally on a flexible "methodology". This "flexibility" is consistant, not inconsistant, with CICA; and there is clearly no exemption from competition.

Express statutory *authority* to procure through sharing agreements does not, "for that reason,"[26] authorize the use of sole-source procurement procedures. The court's decision to the contrary completely stifles CICA.

3. Congress' Post-CICA Appropriations For The Sharing Program Neither Ratify The VA's Disregard Of Competition Nor Supply Express Statutory Authority For Its Exclusion.

The court of appeals erred in holding that a 1985 appropriations measure,[27] authorized or ratified by implication the VA's sole-source activities under § 8153. Neither the appropriations bill nor its legislative history[28] make any reference whatsoever to the use of procurement procedures or competition. Moreover, at no time during this proceeding has VA claimed sole-source authority on the basis of the appropriations measure. The opinion of the court of appeals was the *first* proffering of this "authority."

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[26] According to the court of appeals, "the question here is whether the sharing agreement expressly permitted by § 8153 was *for that reason* not required to comply with CICA." 974 F.2d, @ 572-573. *Appendix A,* @ A-16. (emphasis added).

[27] Cong. Rep. No. 363, 99th Cong., 1st Sess. 22 (Nov. 8, 1985). Prior to 1985, the VA was using the authority of 38 U.S.C. § 8153 to enter only *shared use* agreements with private facilities. The appropriations measure expanded the class of sharing partners and created a pilot program authorizing VA to enter *shared acquisition* agreements.

[28] S. Rep. No. 99-129, 99th Cong., 1st Sess. 82, 88-89 (Aug. 28, 1985).

Ex Parte Mitsuye Endo, 323 U.S. 283, 65 S.Ct. 208 (1944), provides the standard by which appropriations legislation is considered probative of Congressional intent: "the appropriation must plainly show a purpose to bestow the *precise authority* which is claimed." 323 U.S.C., @ 303 n.24, 65 S.Ct., @ 219 n.24. (emphasis added). Obviously, when making an appropriation, "Congress may support [a program's objectives] without ratifying every phase of the program."[29] *Id.*

In *Andrus v. Sierra Club,* 442 U.S. 347, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979), Mr. Justice Brennan for a unanimous Court explained that

> the rules of both Houses "prohibit 'legislation' from being added to an appropriations bill.' "[30] . . . The distinction is maintained "to assure that program financial matters are considered independently of one another. This division of labor is intended to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation."[31] House and Senate rules thus re-

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[29] Relying on the *Endo* standard, several circuits have rejected agency attempts to transform appropriations measures into authorizing legislation in the absence of very clear congressional intent. See *D.C. Federation Civic Associations, Inc. v. Airis,* 391 F.2d 478 (D.C. Cir. 1968); *City of Santa Clara California v. Andrus,* 572 F.2d 660, 672 (9th Cir. 1978); *D.C. Federation of Civic Associations, Inc. v. Airis,* 392 F.2d 478, 481 - 482 (D.C. Cir. 1968); *Zarr v. Barlow,* 800 F.2d 1484, 1492 (9th Cir. 1986); *concerned Citizens of Buck Hill Falls v. Grant,* 537 F.2d 29 (3rd Cir. 1976); *United States v. Stauffer Chemical Co.,* 684 F.2d 1174, 1189 (6th Cir. 1982).

[30] *Quoting,* L. Fisher, Budget Concepts and Terminology: The Appropriations Phase, in 1 Studies in Taxation, Public Finance and Related Subjects—A Compendium 437 (Fund for Public Policy Research 1977).

[31] *Quoting,* House Budget Committee, Congressional Control of

> quire a "previous choice of policy . . . before any appropriations might be included in a general appropriations bill."[32]

442 U.S., @ 359-62, 99 S.Ct., @ 2341-43. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190-191, 98 S.Ct. 2279, 2300, 57 L.Ed.2d 117 (1978), former Chief Justice Burger observed that

> . . . both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purposes forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every appropriation before voting on an appropriation, but it would flout the very rules of Congress carefully adopted to avoid this need.

There can be no doubt that by appropriating funds to create the pilot program Congress authorized the VA to enter shared acquisition agreeements under the authority of 38 U.S.C. § 8153. There is, however, no evidence whatsoever of Congressional intention to authorize *sole-source*

Footnote continued.

Expenditure 19 (Comm. Print 1977).

[32] *Quoting, United States ex rel. Chapman v. FPC*, 345 U.S. 153, 164 n.5, 73 S.Ct. 609, 616, 97 L.Ed. 918 (1953).

shared acquisition agreements. By failing to so much as mention the "precise authority claimed" (sole-source contracting), it is illogical and contradictory to suggest that Congress authorized *by implication* an *express* exemption to CICA.

4. Self-Exempting Regulations Cannot Be "controlling" When CICA Requires Express Statutory Exemption From Competition.

CICA mandates full and open competition except in the case of "procurement procedures otherwise expressly authorized by statute." 41 U.S.C. § 253(a). Incredibly, the court of appeals found "controlling"[33] a self-exempting *regulation* originally adopted *prior to CICA*, but re-enacted in 1986 purportedly to implement CICA. While acknowledging that this regulation "is not a statute,"[34] the opinion fails to explain how the regulation can be "controlling" when no *express* statutory basis can be identified. The obvious reason why this regulation "should not be controlling" is that CICA makes competition the rule and requires *express Congressional* dispensation.

In *Chrysler Corporation v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L. Ed. 2d 208 (1979), the Court held that the disclosure of certain information was not "authorized by law" within the meaning of the Trade Secrets Act on the theory that regulations issued by the Office of Federal Contract Compliance Programs were the source of that authorization. According to the Court, a regulation can have the "force and effect of law" if (1) it "effects in-

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[33] "We therefore can discern no valid reason why 806.302-5(b) should not be controlling." 974 F.2d, @ 575. *Appendix A*, @ A-21.

[34] "Admittedly, this regulation . . . is not a statute." 974 F.2d, @ 574. *Appendix A*, @ A-20.

dividual rights and obligations"[35] and (2) it "is the **product of a congressional grant of legislative authority.**"[36] The regulations at issue in *Chrysler Corporation* did not have "the force and effect of law" because

> . . . the thread between [those] regulations and any grant of authority by Congress [was] so strained that it would [have done] violence to establish principles of separation of powers to denominate the particular regulation "legislative" and credit them with the "binding effect of law."[37]

In the case at bar, the court of appeals incorrectly found that 48 C.F.R. § 806.302-5(b) is a permissible enabling regulation to the 1985 Appropriations Measure. 974 F.2d, @ 575. *Appendix A,* @ A-21. On the contrary, the regulation was originally enacted on December 3, 1983, 48 C.F.R. § 3-3.204-50. The stated purpose of the 1986 reenactment was to implement *CICA*, not the appropriations measure. 51 Fed. Reg. 23065-1 (June 15, 1986). No mention was made of the expanded Sharing Program except to continue its agency-created unilateral exemption from competitive procedures.

In a concurrence to *Chrysler Corporation, supra.*, Justice Marshall pointed out the practical rationale for not permitting regulatory exemption when only statutory exemption is allowed:

> In imposing the authorization requirement . . . Congress obviously meant to allow only those disclosures contemplated by Congressional action. Otherwise, the agency Congress intended to

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[35] 441 U.S., @ 302, 99 S.Ct., @ 1718.

[36] *Id.* (emphasis added).

[37] 441 U.S., @ 307, 308, 99 S.Ct., @ 1720.

> control could create their own exception. . . simply by promulgating valid . . . regulations.

441 U.S., @ 319, 99 S.Ct., @ 1727 (Marshall, J., concurring). This same analysis applies in the instant case, and it is no less applicable because of irrelevant historical VA position or post-CICA appropriations legislation. Regulations cannot control the decision in this case; statutes must.

5. The Sharing Program's Year End Reporting Requirement Does Not Authorize Exemption From Competition.

Contrary to the decision below,[38] a 1991 amendment to 38 U.S.C. § 8153(e) imposing a year-end reporting requirement is not evidence of Congressional approval of sole-source contracting and does not constitute an exemption from CICA. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616 - 617, 100 S.Ct. 1905, 1910, 64. L.Ed.2nd 548 (1980). Nothing in the history of CICA "points in a different direction than does the plain language of the statute." *Id.*, @ n.18.

The reporting requirement imposed by § 8153(e) requires *a year-end report.* It is inconceivable that Congress intended to render inapplicable a complete body of law designed to create a statutory presumption for competition merely by subjecting a program to an after-the-fact annual reporting requirement. Reporting requirements are found

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[38] The court of appeals specifically found that, "[t]he reporting requirement, which permits Congress to monitor sharing arrangements . . . would suggest that Congress sought to ensure fairness and efficiency . . . by means other than competitive bidding." 974 F.2d, @ 574. *Appendix A*, @ A-20.

in virtually every statute that authorizes the expenditure of public funds, most of which are subject to CICA and few of which are expressly exempted.[39]

Congressional monitoring simply cannot eliminate the need for, or overcome the presumption in favor of, competition. Ten years prior to CICA Congress created the Office of Federal Procurement Policy ("OFPP"), 41 U.S.C. § 401 et seq., to "promote economy, efficiency, and effectiveness"[40] in government procurement by, among other things, *monitoring* government procurement practices and keeping "Congress and its duly authorized committees fully and currently informed. . .." 41 U.S.C. § 407(a). Obviously, CICA was created to ensure what Congressional monitoring could not.

Legislative history of the 1988 amendments to the OFPP belies the court of appeals' naive suggestion that Congress can ensure fairness and efficiency by monitoring the operations level of government contracting:

> . . . [t]he magnitude of government contracting activities is such that *responsibility for procurement policy must be exercised primarily by the agencies.* While the OFPP can provide effective stimulus to agency actions, the *Committee looks to the individual agencies to initiate and execute*

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[39] See for example, 16 U.S.C. § 1a, et seq., (Secretary of Interior's authority to procure concession services) which expressly imposes an extensive reporting requirement on both the Park Director and the Secretary. According to *Yosemite Park v. United States*, 582 F.2d 552 (Ct. Cl. 1978), competition nonetheless applies to concession agreements. See also e.g., 38 U.S.C. § 8123 et seq. (VA procurement of medical services - no mention of competition); 38 U.S.C. § 7802 et seq. (VA procurement for canteen services - expressly exempts formal advertising) and 38 U.S.C. § 1718 et seq. (VA procurement of therapeutic activities), all of which require year end reports to Congress.

[40] 41 U.S.C. § 401.

meaningful procurement reform.[41]

* * *

In the four years since the FAR's implementation, however, the Committee has become concerned about the emergence of serious problems with the maintenance and management of the FAR system. Problems with the study [include]:

> The process for amending and maintaining the FAR is overly cumbersome and time comsuming. On average, it takes 16 months to process a change in the rules;
>
> *Redundancies and inconsistencies continue to exist between the FAR and agency supplementing regulations implementing FAR.* Much of the value of a single FAR was being undercut as individual agency supplements began to proliferate;[42]
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> * * *
>
> . . . the fundamental lack of overall management of the FAR system continues to be a problem. . .. *These conditions are symptomatic of a program that is performing contrary to the purposes for which Congress mandated the FAR system.*[43]

Congress sought to "ensure fairness and efficiency" when it enacted CICA in 1984. It is the VA's obligation to comply. The 1991 reporting requirement does not relieve VA of that obligation.

There is no express Congressional authorization for the VA to enter sole-source procurement contracts under the sharing authority. The Court of appeals' reliance on

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[41] S. Rep. No. 424, 100th Cong., 2nd Sess. 134, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5687, 5690. (emphasis added).

[42] *Id.*, @ 5699 (emphasis added).

[43] *Id.*, @ 5700 (emphasis added).

statutory history, an appropriation measure, an agency regulation, a post-CICA reporting requirement, and VA sole-source history was in complete disregard of CICA's express terms and the public interest.

D. *The 5th Circuit's Implication That The VAMC-Cabrini Agreement Is Not A Procurement Contract Elevates Form Over Substance And Critically Limits The Competition In Contracting Act, Which Was Expressly Enacted To Provide Greater Flexibility In The Use Of Competiton For Government Contracting.*

Rapides does not, as suggested by the court of appeals, "pin its hopes,"[44] on the statutory definition of procurement.[45] On the contrary, the VAMC-Cabrini agreement, when tested in its entirety, fits squarely under *any* definition of procurement, including the definition adopted by the court:

> . . .the process by which the government pays money or confers other benefits in order to obtain goods and services . . .
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> * * *
>
> . . . or use of private property or services.

974 F. 2d, @ 573-574. *Appendix A*, @ A-18, 19. Quite simp-

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[44] *Appendix D*, @ A-17.

[45] The OFPP defines "procurement" as "including all stages of the process of acquiring property or services, beginning with the process of determining a need for property or services and ending with a contract completion and close out." 41 U.S.C. § 403(2). Despite absence of any other statutory definition, because § 403(2) is prefaced with the phrase "as used in this chapter," the court of appeals held that it was "*inapplicable* to CICA," (974 F.2d, @ 573, *Appendix A*, @ A-17, and applied "*exclusively* to Chapter 7 of Title 41." *Id.* (emphasis in original). Further, the court of appeals completely failed to acknowledge the equally broad definition of "acquisition" in the FARs, 48 C.F.R. § 2.101, which is unquestionably applicable.

ply, the government *exchanged benefits* (use of the accelerator and money or cost credits for servicing VAMC patients) *for goods and services* (Cabrini's donation, facilities, health care personnel, and the rendition of specialized and technical medical services). That conclusion is inescapable.

The court of appeals' willingness to segregate the individual parts of the VA-Cabrini MOU impermissibly elevates form over substance and permits in three steps what obviously could not be permitted in one. "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law." *United States v. City and County of San Francisco,* 310 U.S. 16, 28, 60 S.Ct. 749, 756 (1940), *rehearing denied,* 310 U.S. 657, 60 S.Ct. 1071, 84 L.Ed. 1420. Sole-source activities are not made legitimate by the VA's three-step sharing arrangements.

CICA does not apply only to "classic procurement," 974 F.2d, @ 574, *Appendix A,* @ A-19, agreements. There is not a single word in either CICA or its lengthy legislative history that supports the exclusion of non-classic procurements. Moreover, there is no support for the court's finding that the OFPP definition of procurement "is considerably broader than the definition of procurement subject to the particularized bidding and negotiation requirements specified by CICA." 974 F.2d, @ 573, *Appendix A,* @ A-17.[46]

Perhaps the best example of the court of appeals' misunderstanding, or disregard, of CICA's objectives is

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[46] By comparison, there is specific authority for applying the OFPP definitions to the procurement procedures provisions of CICA. See for instance, *United States v. Thorson Co.,* 806 F.2d 1061, 1064 (Fed. Cir. 1986) and *Abel Converting, Inc. v. U.S.,* 679 F.Supp. 1133, 1138 (D.D.C. 1988), specifically relying on the Chapter 7 definition of "full and open competition," 41 U.S.C. 403(7), notwithstanding the phrase "as used in this chapter."

the court's statement that the Secretary's discretion under § 8153(b) "bears little resemblance to competitive bidding procedures in which the participating government agency attempts to insure a steady supply and minimize its costs *without taking into account added considerations affecting private contractors.*" 974 F.2d, @ 574. *Appendix A*, @ A-20 (emphasis added). That statement is in absolute opposition to CICA's stated purpose: "to permit federal agencies to use the competitive method most conducive to the conditions of the contract." *Senate Report*, @ 2174. The discretion granted the Secretary under the sharing program is perfectly consistent with the mandate of competition. If it were not, CICA would prevail, not the sharing program. As noted in *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617, 100 S.Ct. 1905, 1910, 64 L.Ed.2nd 548 (1980), "[t]he authority conferred by [the FPASA] shall be in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith. . .." *Id., citing* 40 U.S.C. § 474.

According to Congress, the flexible competitive procedures under CICA "can enhance innovation and increase effective competition by permitting a range of distinct property or services to qualify as responsive when desirable, but permit the use of design specifications when most appropriate." *Senate Report*, @ 2193. The unorthodox VAMC-Cabrini agreement clearly does not escape CICA's intended broad scope. The 5th Circuit's restrictive interpretation of this critically important public policy statute is absolutely insupportable.

IV. CONCLUSION

The Court of Appeals opinion is based principally on unsound factors neither argued nor briefed by the parties, ignores express prior precedent of this Court, and relegates the public interest to its pre-CICA back seat. The decision purports to satisfy the Congressional requirement of express statutory authority with mere unwarranted implication from appropriations and reporting legislation in direct conflict with this Court's decision in *In Re: Endo.* By finding a self-exempting VA regulation to be "controlling;" where the underlying statute sets forth *no* "procurement procedures," the 5th Circuit's decision opens the door to the very public harm that CICA was designed to correct. Petitioner respectfully suggests that certiorari should be granted to consider and decide these issues of public importance in the exercise by the VA and other federal agencies of their procurement responsibilities.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served by mailing the same upon opposing counsel of record, Mr. John R. Halliburton, Mr. John Seigel and Mr. David Spence by United States Mail, First Class postage prepaid.

Alexandria, Louisiana, this ____ day of _____, 1993.

_____

OF COUNSEL

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5097

FILED
SEP 24 1992

RAPIDES REGIONAL MEDICAL CENTER,
Plaintiff, Intervenor-
Defendant-Appellee,

versus

SECRETARY, DEPARTMENT OF
VETERANS' AFFAIRS,
Defendant, Intervenor-
Defendant-Appellant,

and

ST. FRANCES CABRINI HOSPITAL,
Movant, Intervenor-
Plaintiff-Appellant

Appeals from the United States District Court
for the Western District of Louisiana

Before GOLDBERG, JONES, and DeMoss, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The centerpiece of this dispute is a dual energy linear accelerator, a sophisticated radiation therapy device used on cancer patients. Two hospitals in Rapides Parish, Louisiana — one private, the other operated by the Department of Veterans Affairs (VA) — entered into a "sharing agreement" for the acquisition and joint use of such an accelerator. Under the agreement, the Alexandria Veterans Affairs Medical Center (VAMC) would procure the accelerator, with nearby St. Francis Cabrini Hospital (Cabrini) donating one-half the cost of the machine to the VAMC.[1] The VAMC-owned accelerator would then be housed at Cabrini and available for use by both institutions. Shortly before negotiations over the sharing agreements had been completed, neighboring Rapides Regional Medical Center (Rapides) got wind of the deal and sought to block it. Rapides, which operates two linear accelerators of its own, and which currently provides accelerator and related services to the VAMC,[2] charged that the sharing agreement violated the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 251 *et. seq.*,

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[1] The VAMC-Cabrini agreement consisted of: (1) a Letter of Intent between the VAMC and Cabrini; (2) a Memorandum of Understanding between the two facilities ("MOU"), requiring Cabrini to donate one-half the cost of the accelerator — approximately $750,000 — to the VAMC in exchange for housing and operating it at Cabrini; (3) a proposed sharing agreement, governing the joint use of the accelerator and providing for Cabrini to render certain related services to VAMC and its patients; and (4) a cost analysis for the accelerator.

[2] From March 1985 to the period relevant to this lawsuit, the VAMC contracted with Rapides for radiation therapy using Rapides' accelerator. In late 1989, VA officials, apparently concerned that Rapides was charging too much for the use of its accelerator and related services, began exploring possible alternatives. When the VA learned that Cabrini was planning to acquire its own accelerator, it entered into negotiations for a possible sharing agreement, culminating in the signing of the MOU in August 1990. Rapides estimates that its contract with the VA accounts for twenty percent (20%) of its total revenue form radiation therapy services.

because it was never subjected to public bidding. After an administrative appeal dismissed as untimely by the Comptroller General,[3] Rapides won a permanent injunction against the sharing agreement in district court. *Rapides Regional Medical Center v. Derwinski*, 783 F.Supp. 1006 (W.D. La. 1991). Both the VA and Cabrini, which had intervened in those proceedings, appealed the district court's decision, and we granted expedited review.

I.

STATUTORY BACKGROUND

Before discussing the merits of this case, it may be helpful to trace its statutory contours. Rapides asserts that the Competition in Contracting Act governs this action. Appellee alleges, and the district court agreed, that the VAMC-Cabrini sharing agreement violates CICA's general requirement that federal procurement contracts be awarded competitively.[4] CICA responded to Congressional

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[3] *Rapides Regional Medical Center*, No. B-242601, 91-1 C.P.D. § 159 (Feb. 12, 1991), *reconsideration denied*, *Rapides Regional Medical Center — Reconsideration*, No. B-242601.2, 91-1 C.P.D. § 614 (June 28, 1991).

[4] CICA provides in relevant part:

> (1) Except as provided in subsectiin (b), (c), and (g) of this section and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services:
>
> > (A) shall obtain full and open competition through the use of competitive procedures. . . and
> >
> > (B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

findings that many federal procurement contracts were awarded on a sole-source basis, resulting in widespread inefficiencies and wasterful government spending. According to its drafters, the Act's objectives were "to establish a statutory preference for the use of competitive procedures in awarding federal contracts for property or services, to impose restrictions on the awarding of noncompetitive contracts, and to permit federal agencies to use the competitive method most conducive to the conditions of the contract." S. Rep. No. 50, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News 2174, 2180.

The VA does not contend that its sharing agreement with Cabrini falls within any of the seven enumerated exceptions to CICA that permit sole-source procurement.[5]

Footnote 4 continued.

(2) In determining the competitive procedures appropriate under the circumstance, an executive agency—

(A) shall solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) The award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) There is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

41 U.S.C. § 253(a).

[5] On appeal, Cabrini attempts to avail itself of the exception provided by § 253(b)(1)(A), which provides:

However, both Cabrini and the VA would find refuge in the savings clause to § 253(a)(1), which exempts from CICA "procurement procedures otherwise expressly authorized by statute." As asserted proof of this authority, appellants cite 38 U.S.C. § 8153, empowering the VA to enter into sharing agreements for the acquisition and joint use of advanced medical technology.[6]

Footnote 5 continued.

(b) exclusion of particular source; restriction of solicitation to small business concerns

(1) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service if the agency head determines that to do so—

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services[.]

By its own terms, however, subsection (b)(1)(A) applies only to agencies that are already "using competitive procedures." The VA stipulated before the district court that it did not use competitive procedures when it entered into the sharing agreement with Cabrini. In any event, Cabrini raises this argument for the first time on appeal, and we will not consider it here.

[6] Section 8153 provides:

(a) To secure certain specialized medical resources which otherwise might not be feasibly available or to effectively utilize certain other medical resources, the Secretary may, when the Secretary determines it to be in the best interest of the prevailing standards of the Department medical care program, make arrangements, by contract or other form of agreement, as set forth in clauses (1) and (2) below between Department health-care facilities and other health-care facilities (including organ banks, blood banks, or similar institutions), research conters, or medical schools:

(1) for the mutual use, or exchange of use, of specialized medical resources when such an agreement will obviate the need

Congress initially authorized the sharing program set forth in § 8153 "for the exchange of use (or under certain conditions the mutual use) of specialized medical facilities between Veterans' Administration hospitals and other public and private hospitals or medical schools in a medical community." S. Rep. No. 1727, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 4210, 4219-20. In 1985, after CICA's enactment, Congress expanded the sharing program to other medical facilities, appropriating up to $10 million for a pilot program in which VA facilities would purchase advanced medical equipment so long as non-federal sources agreed to finance at least fifty percent (50% of the acquisition costs. Conf. Rep. No. 363, 99th Cong., 1st Sess. 22 (Nov. 8, 1985). According to the Senate Appropriations Committee:

Footnote 6 continued.

> for a similar resource to be provided in a Department health care facility; or
>
> > [2] for the mutual use, of specialized medical resources in a Department health care facility, which have been justified on the basis of veterans' care, but which are not utilized to their maximum effective capacity.
>
> (b) Arrangements entered into under this section shall provide for reciprocal reimbursement based on a methodology that provides appropriate flexibility to the heads of the facilities concerned to establish an appropriate reimbursement rate after taking into account local conditions and needs and the actual costs of the providing facility of the resource involved. Any proceeds to the Government received therefrom shall be credited to the applicable Department medical appropriation and to funds that have been allotted to the facility that furnished the resource involved.
>
> . . .
>
> (e) The Secretary shall submit to the Congress not more than 60 days after the end of each fiscal year a report on the activities carried out under this section.

> The purpose of this funding is to help the VA to acquire costly, advanced state-of-the-art medical equipment more easily and to provide a means of using that equipment to maximum effectiveness by encouraging long-term sharing with community institutions. . . . The committee recognizes that there are limits to what medical communities and the Federal Government can individually accomplish, but believes that this proposed arrangement will provide VA beneficiaries and the VA medical centers and community medical institutions with access to prohibitively expensive major medical equipment which would otherwise not be available to either.

S. Rep. No. 99-129, 99th Cong., 1st Sess. 82, 88-89 (Aug. 28, 1985).[7]

Shortly after Congress began funding the sharing program, the Veterans Administration (predecessor to the Department of Veterans Affairs) promulgated interim rules to implement CICA. *See* 51 Fed. Reg. 23065-73 (June 25, 1986). significantly, the VA stipulated that "[s]haring contracts negotiated under 38 U.S.C. § 5053 are approved for other than full and open competition." *Id.* at 23066.[8] The VA explained that its "[j]ustification and approval

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[7] Congress authorized the expanded sharing program, which is officially known as the Advanced Technology Medical Equipment Acquisition and Sharing Program, in 1990. *See* Pub. L. 101-366, Title II, § 202 (b), Aug. 15, 1990, 104 Stat. 438. However, the above-cited Conference Report, *see* Conf. Rep. No. 363, *id.*, indicates that Congress began *funding* the sharing program as early as 1985 — nearly five years before it was formally authorized.

[8] 38 U.S.C. § 5053 was later recodified as § 8153. *See* Pub. L. 102-40, Title IV, § 402(b)(1), May 7, 1991, 105 Stat. 238. As earlier noted, the 1990 program set forth in what is now § 8153 is an expansion of the original VA sharing program, first enacted in 1966 as § 5053.

procedures for proposed noncompetitive acquisitions . . . are critical in effectively implementing the CICA and will provide the basis for compiling the VA annual report to Congress." *Id.* at 23065. The VA's interim rules were finalized and implemented in 1987. *See* 52 Fed. Reg. 28559, 28560 (July 31, 1987).[9]

To summarize: congress first adopted the VA sharing program in 1966. The program as enacted did not address competitive procurement procedures. Congress enacted CICA in 1984, creating a statutory presumption in favor of competition "except in the case of procurement procedures . . . expressly authorized by statute." The following year, Congress ezpanded the sharing program by appropriating funds to finance the acquisition and joint use of advanced medical equipment along the lines of the VAMC-Cabrini agreement. In response, the VA in 1987 implemented regulations providing that despite CICA's enactment, the sharing program did not require full and open competition. Finally, Congress amended the sharing program in 1990 at what is now § 8153, expanding the existing program substantially but making no mention of CICA.

Against this statutory backdrop, the district court permanently enjoined the VAMC-Cabrini agreement after holding that Congress did not explicitly exempt the sharing program from CICA when it amended § 8153 in 1990. While acknowledging the VA regulation set forth at 48 C.F.R. 806.302-5(b), which exempts the sharing program from CICA, the court noted:

> 48 C.F.R. 806.302-5(b) . . . antedates [sic] the rather precise statutory language of "otherwise

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[9] *See also* 48 C.F.R. 806.302-5(b) (1991).

> expressly authorized by statute" as founded in 41 U.S.C. § 253(a). Congress said that the public bid law can be circumvented by express language contained in a statute. The regulation from the Veterans Administration is not a statute. Congress created the measuring stick and retained the power to delete public bid law requirements from contracts for goods and services. The VA is powerless to change the clear procedure set by Congress.

783 F.Supp. at 1008. The district court did not address the pre-CICA legislative history of § 8153, nor did it review the 1985 appropriations legislation expanding the existing sharing program to private hospitals.

Cabrini and the VA argue that Congress never intended the Competition in Contracting Act to apply to a sharing program that has been on the books since 1966. The program is either exempted from the act by § 8153, they contend, or falls outside CICA because sharing agreements do not involve the "procurement" of equipment. Appellants also challenge Rapides' standing to sue. We address these arguments in reverse order.

II.

STANDING

Cabrini and the VA first contend that the district court erred in failing to enter a specific finding that Rapides has standing to bring this lawsuit. They insist on a remand or, in the alternative, a ruling that as a matter of law Rapides lacks standing to sue. Appellants acknowledge that disappointed bidders have prudential standing under the Administrative Procedure Act to challenge agency violations of federal procurement requirements. *See*

Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 873 (D.C. Cir. 1970); *Hayes International Corp. v. McLucas,* 509 F.2d 247, 257 (5th Cir.), *cert. denied,* 423 U.S. 864, 96 S. Ct. 123, 46 L.Ed.2d 92 (1975) (adopting *Scanwell*). They maintain, however, that Rapides lacks standing because it is neither an actual nor a prospective bidder on the VA's plan to acquire a linear accelerator.[10] Establishing prudential standing to challenge a government contracting decision requires: (1) an allegation of injury in fact; (2) a claim that CICA was "arguably" intended to prevent the agency's action; and (3) the absence of Congressional intent to withhold judicial review. *Contractors Engineers International, Inc. v. Dept. of Veterans Affairs,* 947 F.2d 1298, 1300 n.9 (5th Cir. 1991); *Gull Airborne Instruments, Inc. v. Weinberger,* 694 F.2d 838 (D.C. Cir. 1982) (citing *Control Data Corp. v. Baldridge,*[11] 655 F.2d 283, 288-89 (D.C. Cir.), *cert. denied,* 454 U.S. 881, 102 S. Ct. 363, 70 L.Ed.2d 190

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[10] The disappointed bidder requirement stems from the familiar "zone of interests" test mandated by the Administrative Procedure Act. The APA waives the sovereign immunity to which government agencies woud otherwise be entitled for all persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute. . . ." 5 U.S.C. § 702. In its complaint, Rapides premised jurisdiction on 28 U.S.C. § 1331 (federal question jurisdiction) and 31 U.S.C. § 3556 (permitting "any interested party" to challenge alleged violations of federal procurement law). The BA suggests that Rapides erred by failing to tie jurisdiction in this case directly to the APA. But as the VA candidly admits elsewhere in its brief, "it does not matter whether the suit is thought of as an APA action or an action brought directly under CICA, so long as it is clear that the plaintiff must be an actual or prospective bidder in order to have standing." *See, e.g., Waste Management of North America v. Weinberger,* 862 F.2d 1393, 1397-98 (9th Cir. 1988); and *MCI Telecommunications Corp. v. United States,* 878 F.2d 362, 365 (Fed. Cir. 1989). Neither the VA nor Cabrini challenges Rapides' constitutional standing to bring this action. *See generally Scanwell Laboratories,* 424 F.2d at 871-73.

[11] *Baldridge* has since been questioned by *Clarke v. Securities Industry Ass'n.,* 479 U.S. 388, 107 S. Ct. 750, 93 L.Ed.2d 757 (1987), on grounds that are not relevant here.

(1990)). We are convinced that "[s]atisfaction of the first factor is clear from the preceding discussion, and there is no clear and convincing Congressional intent to withold judicial review." *Abel Converting, Inc. v. United States*, 679 F.Supp. 1133, (D.D.C. 1988). As for the second requirement, assuming that the sharing agreement was covered by CICA, that statute supplies its own answer:

> 'Interested party', with respect to a contract or proposed contract . . . means an *actual or prospective bidder or offeror* whose direct economic interest would be affected by the award of the contract or by failure to award the contract[.]

31 U.S.C. § 3551(2) (emphasis added).

Thus, to object to the award of a contract allegedly covered by CICA, Rapides must demonstrate that it was an actual or prospective bidder or offeror on the sharing agreement. Because Rapides was not an actual bidder, the prudential standing issue turns on its claimed status as a prospective bidder. Appellants insist that the district court never addressed this issue, asserting that Rapides would not have bid on the sharing agreement had it been given the opportunity to do so. This is unpersuasive. Implicit in the district court's holding that Rapides was denied the opportunity to participate in the sharing agreement is the recognition that Rapides would have done so if given the chance. There is sufficient evidence in the record that Rapides stood ready and willing to participate in the sharing program had it been offered the opportunity to do so. In suggesting otherwise, appellants ignore not only the specific allegations in Rapides' verified complaint, but the affidavit of its president, James T. Montgomery, who stated that "[h]ad Rapides Regional been given the opportunity, Rapdies Regional would have submitted a proposal

to VAMC in connection with consideration of submissions under the 1990 Advanced Medical Equipment Share Acquisition Program . . . ."[12] While appellants point to some evidence that might be interpreted as disproving Rapides' intent to participate in the sharing agreement with the VAMC if offered the chance, the district court's implied factfinding is not clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Had the district court been convinced that Rapides' real motive was to block the VA-Cabrini deal rather than to make a competing offer, it would have had to deny standing, because Rapides would not then be an actual or prospective bidder. This conclusion was not compelled by the evidence, and we decline to overturn the court's finding.[13]

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[12] Admittedly, Rapides sought to block the VAMC-Cabrini agreement *after* it had been executed, writing letters to Members of Congress and others asserting that the new linear accelerator was duplicative and unnecessary. But this last-ditch lobbying effort does not controvert Rapides' contention that it would have bid on the sharing agreement *at the outset*, before the negotiations were a *fait accompli*.

[13] We need not and do not here decide that *any* prospective or actual bidder necessarily has standing to challenge a government procurement decision arguably governed by CICA. *Compare Waste Management of N. America v. Weinberger*, 862 F.2d 1393, 1397-98 (9th Cir. 1988). Affirmance of the district court is based on Rapides' evidence that it could and would participate in the program if offered the opportunity and that its self-interest dictated such a decision because of its previous arrangement to supply other radiation therapy services to the VA. Cabrini also argues that Rapides waived its claim by failing to file a timely protest with the Comptroller General, the federal official charged with hearing bid protests at the administrative level. This argument wrongly assumes that the Comptroller General has exclusive jurisdiction to hear CICA protests. In fact, the statute expressly provides otherwise. *See* 31 U.S.C. § 3556 (stating that administrative remedies under CICA are non-exclusive).

III.

PROCUREMENT

Appellants next confront CICA directly by arguing that the shared acquisition of specialized medical resources[14] for mutual use under § 8153 is not a "procurement" within the meaning of CICA,[15] but more closely resembles a lease or sale of government property. The VA cites several decisions of the Comptroller General to this effect.[16] In particular, the VA directs this court's atten-

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14 As defined by 38 U.S.C. § 8152(2):

> The term "specialized medical resources" means medical resources (whether equipment, space, or personnel) which, because of cost, limited availability, or unusual nature, are either unique in the medical community or are subject to maximum utilization only through mutual use.

15 CICA applies only to an executive agency conducting a "procurement for property or services." 41 U.S.C. § 253(a)(1).

16 *See Jefferson Bank & Trust*, No. B-228563, 87-2 C.P.D. § 390 (Oct. 23, 1987) (government agency's leasing of government-owned office space is not a procurement and therefore subject to CICA); *Crystal Cruises, Inc.*, No. B-238347, 90-1 C.P.D. § 141 (Feb. 1, 1990) (government award of a concession permit allowing a shipping company to operate within a national park is a license to enter government property, not a procurement of property or services under CICA); and *Columbia Communications Corp.*, No. B-236904, 89-2 C.P.D. § 242 (Sept. 18, 1989) (NASA did not procure property or services within the meaning of CICA by permitting private contractor to use government satellite).

The degree of deference to be paid to decisions of the Comptroller General is a matter of some dispute. According to one treatise:

> There is an increasing tendency on the part of United States district courts and United States Circuit Courts of Appeal to refer bid protest cases to the General Accounting Office because of that agency's "special competence and experience." This tendency is not followed in the United

tion to *Surface Alloys Corp.*, B-222703, 86-2 C.P.D. § 7 (June 25, 1986). That case involved a controversy not unlike this one. The U.S. Navy purchased a complicated piece of equipment known as an ion implanter and leased it to a private company that was performing research and development under a Navy contract. Another company protested this action, arguing that it gave the Navy's contractor an unfair competitive advantage. The comptroller General dismissed the protest, holding that the lease was not a procurement under CICA.

While the district court in this case did not define "procurement" for purposes of CICA, its holding rests on the tacit assumption that a procurement has taken place.

Footnote 16 continued.

> States Claims Court, which is the most prestigious court in the area of government contracting. It would seem that the United States Court of Appeals for the District of Columbia Circuit is of the view that a decision of the General Accounting Office may not be reversed unless it is "arbitrary and capricious," *Steinthal & Co., Inc. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971). However, the majority of district courts are of the opinion that the decisions of the Comptroller General are advisory only and are not binding upon the court.

McBride & Touhey, 1A GOVERNMENT CONTRACTS at § 7.10. Appellants urge us to afford *Chevron* deference to Comptroller General decisions interpreting statutes entrusted to the GAO by Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Even our pre-*Chevron* decisions indicate that "[w]hen actions of procurement officials have been expressly validated by considered decision of the GAO or are in compliance with a reasonably consistent pattern of GAO determinations, the court should be extremely reluctant to overturn such decisions." *Kinnett Dairies, Inc. v. J.C. Farrow*, 580 F.2d 1260, 1272 (5th Cir. 1978). *See also J.H. Rutter Rex. Mfg. Co., Inc. v. United States*, 706 F.2d 702, 711 (5th Cir.), *cert. denied*, 464 U.S. 1008, 104 S. Ct. 526, 78 L.Ed.2d 709 (1983) ("[D]ecisions of the Comptroller General are entitled to special deference given the complexities and intricacies of government purchasing decisions.").

The question thus remains: Did the VA "procure" goods or services from Cabrini and in so doing run afoul of CICA?

For the answer, one must first examine the Memorandum of Understanding between Cabrini and the VAMC. It outlines several stages for the acquisition and mutual use of the linear accelerator: (1) the actual purchase of the accelerator by the VA from the manufacturer; (2) a financing arrangement whereby Cabrini will donate one-half of the accelerator's cost to the VA;[17] and (3) the joint use of the machine by the VA and Cabrini under the terms of the sharing agreement to be negotiated at a later date.[18] The VA emphasizes that the accelerator was purchased from the manufacturer using competitive procurement procedures, whereas the financing and shared use of the VA-owned accelerator is akin to a lease or sale of government property.[19] For its part, Rapides argues that the transaction must be viewed as an integrated whole: the shared acquisition of property (the linear accelerator) as well as services (including Cabrini's facilities, personnel and other specialized medical services). To bolster its argument, Rapides cites *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958 (4th Cir. 1984) and *Yosemite Park v. United States*, 582 F.2d 552 (Ct. Cl. 1978).

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[17] Such donations are authorized at 38 U.S.C. § 8303. The amount of the donation at issue in this case (fifty percent of the purchase price of the accelerator) is consistent with the pilot program established by Congress. *See* Conf. Rep. No. 363, 99th Cong. 1st Sess. at 22.

[18] VA's brief takes pains to observe that "there is as yet no agreement to procure such services [from Cabrini]. *If* the VA contracts for such services from Cabrini, that would be a procurement, and Rapides might well have standing to challenge it." VA contends, however, that under § 8153, such a transaction would still not be subject to CICA.

[19] Cabrini takes a slightly different position: that the VA's procurement of the linear accelerator "has not been challenged" so that CICA provide accelerator-related services to VA clients.

In *Motor Coach Industries,* the Fourth Circuit held that a trust formed by the Federal Aviation Administration to fund ground transportation improvements at Dulles International Airport was public in character, so that CICA applied to all such improvements financed by that trust. To fund the trust, the FAA agreed to waive air carrier fees at Dulles provided that the airlines deposited equivalent funds in the trust. After analyzing the trust's purpose, the court declared it to be a disguised "purchasing agent" created to circumvent normal appropriation channels and the federal procurement process. *Id.* at 968. While Rapides insists that the VA-Cabrini sharing agreement is also an "end-run" around the procurement requirements of CICA, *id., Motor Coach Industries* is plainly distinguishable. Unlike the FAA trust, the circumstances surrounding the sharing program do not suggest any attempt to evade statutory purchase requirements. The question here is whether the sharing agreement expressly permitted by § 8153 was for that reason not required to comply with CICA. Further, the VAMC-Cabarini agreement does not resemble the concession contract at issue in *Yosemite Park.* The National Park Service contracted directly for transportation equipment and services under the guise of a "concession" agreement conferring federal tax breaks on the contractor. In holding that the contractor was bound by federal procurement laws, the court rejected the NPS's efforts to evade those requirements by labeling what was in fact "the purchase of services" as a "concession." 582 F.2d at 558-59. The common thread in both cases, absent here, is an arrangment by the federal government to pay money or confer other benefits in exchange for goods and services. Under the MOU, and under § 8153, the VA received a donation of money from Cabrini in exchange for the shared use of a linear accelerator purchased and owned by the VAMC.

Rapides nonetheless insists that the definition of "procurement" under CICA is broad enough to encompass the VAMC-Cabrini sharing agreement. What is at stake here, Rapides insists, is no less than "a sole-source joint purchase and shared use agreement that falls squarely within the statutory definition of procurement." And there lies the rub: Rapides pins its hopes on a statutory definition of "procurement" that is *inapplicable* to CICA. Specifically, Rapides cites 41 U.S.C. § 403, which provides in relevant part:

> *As used in this chapter* —
>
> (2) the term "procurement" includes all stages of the process of acquiring property or services, beginning with the process of determining a need for property or services and ending with contract completion and closeout[.]

(emphasis added.) The crucial phrase in this passage, "As used in this chapter," means that § 403(2) applies *exclusively* to Chapter 7 of Title 41. Chapter 7, The Office of Federal Procurement Policy Act, 41 U.S.C. § 401 *et. seq.*, establishes the Office of Federal Procurement Policy within the Office of Management and Budget "to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws." 41 U.S.C. § 402(b). In contrast, the full and open procurement requirements of CICA § 253(a) are set forth in Chapter 4. It stands to reason that the definition of procurement for purposes of Chapter 7, which establishes an agency in the executive branch whose mission is to oversee federal procurement policy, is considerably broader than the definition of procurement subject to the particularized bidding and negotiation requirements specified by CICA. Indeed, had Congress

wanted the definition of procurement articulated in Chapter 7 to apply to Chapter 4, it could have done so in express terms.[20]

If anything, Congress' efforts to define "procurement" for purposes of the Office of Federal Procurement Policy Act suggest that the meaning of this term differs elsewhere in Title 41. CICA itself does not define procurement. Nor, for that matter, does the Federal Acquisition Regulations System (FAR), of which 48 C.F.R. 806.302-5(b) — the VA's rules exempting the sharing program from CICA — is a part.[21] However, there can be little doubt that the word procurement is widely understood, by lawyers and laymen alike, to denote the process by which the government pays money or confers other benefits in order to obtain goods and services from the private sector. Black's Law Dictioinary defines "procurement contract" as "[a] government contract with a manufacturer or supplier of goods or machinery or services under the terms of which a sale or service is made to the government." BLACK'S LAW DICTIONARY 1208 (6th ed. 1991). Rapides does not dispute that the VA *procured* the linear accelerator from a private manufacturer, in a procurment process that complied with CICA. What Rapides fails to explain is why an agreement over future *access* to government-owned property, albeit property purchased partly with a private donation from Cabrini, justifies ex-

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[20] *See, e.g.*, 41 U.S.C. § 253(g)(5) (Supp. 1992) (providing that "[i]n this subsection, the term 'small purchase threshold' has the meaning given such term in section 403(11) of this title"). Rapides' reliance on *Hayes v. U.S. Postal Service*, 859 F.2d 354 (5th Cir. 1988), is similarly misplaced. *Hayes* interpreted the definition of "procurement of services" under the Contract Disputes Act, 41 U.S.C. § 601 *et. seq.*, rather than CICA. *Id.* at 355-56. *Hayes* also deals with a "procurement" of suggestions by the government from its employees.

[21] *See* 48 C.F.R. 2.101 *et. seq.* (defining terms used by the FAR).

panding the definition of "procurement" beyond its generally understood meaning. Rapides tries to sidestep the issue by asserting that it would have given a larger donation to the VAMC to purchase the accelerator, although the district court made no findings on this point. But this does not change the fact that the VA never intended to procure the accelerator from either Cabrini or Rapides. To repeat, the classic procurement involves the government's paying money or conferring other benefits in return for the acquisition or use of private property or services. This is decidedly unlike the agreement at issue here in which the VA has received money from a private hospital and used it to purchase a linear accelerator from the manufacturer, in exchange for letting that hospital share its use.

IV.

EXPRESS AUTHORIZATION

Finally, even assuming that the VAMC-Cabrini sharing agreement is a "procurement" for purposes of CICA, we are persuaded that 38 U.S.C. § 8153, which authorizes the VA to enter into such arrangements, is a procurement procedure "expressly authorized by statute" within the meaning of CICA § 253(a)(1) and therefore is not subject to the Act's full and open competition requirements.

As has been already noted, Congress originally enacted what is now § 8153 in 1966, nearly two decades before the passage of the Competition in Contracting Act. In 1985, the year *after* CICA's enactment, Congress expanded the sharing program by appropriating up to $10 million for a pilot program to facilitate sharing agreements like the one later negotiated between Cabrini and the VAMC. Congress evidently saw no reason to revisit § 8153

after CICA's enactment because the sharing program had historically been operated on a sole-source basis.[22]

Moreover, the language of § 8153 is inconsistent with the district court's conclusion that the VA's sharing arrangements must be achieved competitively. For instance, § 8153(b) provides that reimbursement for the shared use of equipment must be based "on a methodology that provides appropriate flexibility to the heads of the facilities concerned," taking into account "local conditions and needs and the actual cost to the providing facility of the resource involved." This bears little resemblance to competitive bidding procedures in which the participating government agency attempts to ensure a steady supply and minimize its costs without taking into account added considerations affecting private contractors. Further, § 8153(e) directs the Secretary of Veterans Affairs to notify Congress annually "on the activities carried out under this section." The reporting requirement, which permits congress to monitor sharing arrangements such as that between Rapides and the VAMC, would suggest that Congress sought to ensure fairness and efficiency in such unique arrangements by means other than competitive bidding.

We also disagree with the district court as to the proper role of 48 C.F.R. 806.302(b), which provides that "[s]haring contracts negotiated under [§ 8153] are approved for other than full and open competition." Admittedly, this regulation, which was implemented after CICA's enactment, "is not a statute." 783 F.Supp. at 1008. But

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[22] The sharing program as enacted by Congress was not subject to competitive procurement rquirements. The Comptroller General later recognized the VA's authority under what was then § 5053 to approve such sharing arrangements on a non-competitive basis. *See Veterans Admin. No.*, No. R-115559.2, 81-2 C.P.C. § 369 (Nov. 2, 1981).

while the district court correctly observed that this regulation was promulgated after the enactment of CICA, the court erred by implying that the VA was attempting to circumvent Congressional intent by exempting the sharing program from § 253(a)(1). On the contrary, the VA regulation was implementing Congress' post-CICA appropriations legislation that expanded funding for the sharing program so long as non-federal sources agreed to finance at least 50 percent of the cost of acquiring advanced medical equipment.[23] We therefore can discern no valid reason why 806.302-5(b) should not be controlling.[24] Rapides is certainly correct that "[t]he VA cannot unilaterally exempt itself from the Congressional mandate of the CICA," but such is not the case here. That Congress did not specifically exempt the sharing program from CICA in 1990, when it amended what was then § 5053, is not especially surprising given that Congress had created and maintained that program by means other than full and open procurement. Congress retained for itself the "measuring stick," 783 F.Supp. 1008, by which to evaluate the success of the sharing program now recodified at § 8153: annual reports from the VA tracking activities under the program. Section 8153(e), which reflects Congress' willingness to exercise its oversight function, belies the district court's claim that the VA was attempting to circumvent Congressional priorities by promulgating 806.302-5(b).

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[23] *See* Conf. Rep. No. 363, 99th Cong., 1st Sess. at 22; and S. Rep. No. 99-129, 99th Cong., 1st Sess. at 88-89.

[24] Nor are we alone in reaching this conclusion. the Comptroller General determined in this dispute that § 8153 sharing arrangements are not subject to the full and open competition requirements of CICA. *See Rapides Regional Medical Center — Reconsideration*, No. B-242601.2, 91-1 C.P.D. § 614 (June 28, 1991). The district court's opinion does not refer to this decision, and it is therefore unclear what, if any, deference it paid to the GAO's analysis and considered judgment.

In view of the plain language of § 8153, its pre-CICA legislative history, and the 1985 appropriations legislation expanding the existing sharing program (and which 48 C.F.R. 806.302-5(b) was intended to implement), it must be concluded that the VA's sharing program is expressly authorized by statute within the meaning of CICA § 253(a)(1) and therefore does not trigger the Act's full and open competition requirements.

V.

CONCLUSION

For all the foregoing reasons, we **REVERSE** the district court's decision. The permanent injunction barring the VAMC-Cabrini Memorandum of Understanding is **VACATED.**

APPENDIX B

RAPIDES REGIONAL MEDICAL CENTER

v.

Edward J. DERWINSKI,
Secretary of the Department of
Veterans' Affairs.

St. Frances Cabrini Hospital,
Intervenor.

No. 91-1577-01

United States District Court,
W.D. Louisiana,
Alexandria Division.

Dec. 3, 1991.

Medical center brought action alleging that agreement between Veterans Administration (VA) hospital and another hospital to share sophisticated diagnostic tool violated Competition in Contracting Act. The District Court, Little, J., held that VA's involvement in 1990 Advanced Technology Medical Equipment Shared Acquisition Program was subject to Competition in Contracting Act.

Ordered accordingly.

Charles S. Weems III, Alexandria, La., for plaintiff.

John Halliburton, Asst. U.S. Atty., Shreveport, La., for defendant.

David P. Spence, Alexandria, La., for intervenor.

JUDGMENT

LITTLE, District Judge.

The facts of this case are not subject to serious dispute but reasonable people can differ reasonably. Hence, able counsel for the parties have submitted the controversy for this court's determination of the legal issues. A short recitation of the facts is in order.

St. Frances Cabrini Hospital and the Veterans' Affairs Medical Center, both located in Rapides Parish, Louisiana and both being providers of health care services in that community, agreed that the VA would acquire a sophisticated diagnostic tool known as a dual energy linear accelerator. The accelerator would be housed in the Cabrini Hospital and would be available for use by both institutions. Cabrini would contribute a portion of the value or cost of the accelerator. In plain language, the VA-Cabrini agreement is a sharing agreement. Cabrini puts up a portion of the cost of the machine, the machine is enconced in the Cabrini Hospital, and the VA owns the machine and has access to its use along with Cabrini.

This sharing relationship has its genesis in a congressional act (38 U.S.C. § 5053, now 38 U.S.C. § 8153) commonly known as the 1990 Advanced Technology Medical Equipment Shared Acquisition Program.

[1] When the details of the Cabrini-VA arrangement came to the attention of the Rapides Regional Medical Center, another health care provider in Rapides Parish, Louisiana, Rapides Medical raised the legal issue that forms the basis for this suit. Rapides Medical asserted that the Cabrini-VA arrangement is fragile in that the contracting parties failed to observe and follow the dictates of the

Competition in Contracting Act of 1984, 41 U.S.C. § 251 et seq. Succinctly, Rapides Medical suggests that the government sharing contract requires public bid. Or more simply, if the VA desires a sharing arrangement, as authorized by the 1990 Advanced Technology Medical Equipment Shared Acquisition Program, then the arrangement must be subject to public bid so that the public agency will receive the best product at the lowest cost.

Rapides Medical requested that this court issue a TRO and ultimately a permanent injunction. This court has jurisdiction to consider the request for relief by Rapides General. A fair reading of the documents presented leaves this court with clear and convincing evidence that Cabrini and the VA have agreed that the VA will acquire a machine to aid in treating cancer patients; that Cabrini will contribute to the VA a sum equal to a portion of the VA acquisition cost; that Cabrini will house the machine and that a sharing of use of the machine will result. Rapides General asserts, and correctly so, that this court has original jurisdiction to hear matters arising under the laws of the United States (28 U.S.C. § 1331(a)) and that a law of the United States, specifically the Competition in Contracting Act of 1984, 41 U.S.C. § 251 et seq. has been violated. The violation eliminated the opportunity of Rapides General to bid on the transaction. The law is clear—this court has jurisdiction to enjoin the continued violation of a federal law. The VA and Rapides Medical agreed to submit the matter on brief and agreed that the performance under the VA-Cabrini agreement would be suspended pending the determination by this court. Cabrini intervened in the action.

The order of this court was modified by an order of Judge Nauman Scott who entertained the request for modification filed by Cabrini. The Judge Scott order was

itself the subject of a stay by the Fifth Circuit Court of Appeals. Upon the undersigned's return from vacation, the Fifth Circuit lifted its stay and returned the matter to this court for disposition.

Finding that the Cabrini and VA arrangement is violative of the Competition in Contracting Act, this court makes permanent the injunction originally issued and enjoins the further implementation of the Cabrini-VA relationship as set forth in a document styled "Memorandum of Understanding Between the VA and Cabrini." The essence of this order is that involvement by a government entity in the 1990 Advanced Technology Medical Equipment Shared Acquisition Program is subject to the Competition in Contracting Act of 1984. As currently structured, the VA-Cabrini combine is the type of activity to which the Competition in Contracting Act of 1984 applies.

The Competition in Contracting Act of 1984, 41 U.S.C. § 251 et seq., was passed "to facilitate the procurement of property and services." Section 252 requires that all purchases and contracts for property and services shall be made by the government by advertising. Section 253, as amended, sets forth the methodology for satisfying the advertising requirements and also lists certain conditions that authorize the governmental agency to contract for property and services without advertising. These exceptions, found in subsection C of section 253, are inapplicable to the instant case and provide no relief to the VA, Cabrini or Rapides General. The statute does refer to exceptions that are "*expressly* authorized by *statute.*" 41 U.S.C. § 253(a) (emphasis supplied).

[2] This court has reviewed the statute creating the Advanced Technology Medical Equipment Shared Acquisition Program, 38 U.S.C. § 5051 et seq., and cannot discern

any implicit, let alone express, provision waiving the application of the Competition in Contracting Act. The plain language doctrine controls our interpretation of a statute. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990). The plain and compelling reading of the Competition in Contracting Act is that its public bid provisions are applicable unless an enabling act created by another statute expressly excludes the application of the Competition in Contracting Act. We note that to suggest that 41 U.S.C. § 253(a)(1) could be read to eliminate this bid requirement in every case in which a statute creates procurement procedures strains statutory construction beyond the plain import and impact of the English language. To support such a construction would lead to absurd consequences.

[3] The parties counter to Rapides General seek solace in a regulation adopted by the Veterans Administration. That regulation, found in 48 C.F.R. 806-302-5, provides in part:

> Sharing contracts negotiated under 38 U.S.C. 5053 are approved for other than full and open competition.

48 C.F.R. 806.302-5(b). The regulation, appearing first as an interim regulation in June of 1986 and as a final regulation in July of 1987, antedates the rather precise statutory language of "otherwise expressly authorized by statute" as found in 41 U.S.C. § 253(a). Congress said that the public bid law can be circumvented by express language contained in a statute. The regulation from the Veterans Administration is not a statute. Congress created the measuring stick and retained the power to delete public bid law requirements from contracts for goods or services. The VA is powerless to change the clear procedure set by Congress.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5097

Filed
NOV 13 1992

RAPIDES REGIONAL MEDICAL CENTER,
Plaintiff-Intervenor-Defendant-Appellee,

versus

SECRETARY, DEPARTMENT OF
VETERANS, AFFAIRS,
Defendant, Intervenor-Defendant, Appellant,

and

ST. FRANCIS CABRINI HOSPITAL,
Movant, Intervenor-Plaintiff-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion 09/24/92 , 5 Cir., 198__, _____F.2d____)

(November 13, 1992)

Before GOLDBERG, JONES, and DEMOSS, JR., Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones

United States Circuit Judge

APPPENDIX D

Medical Center
Alexandria, LA 71301

DEPARTMENT OF
VETERANS AFFAIRS

LETTER OF INTENT
BETWEEN THE
In Reply Refer To:
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
ALEXANDRIA, LOUISIANA

AND

ST. FRANCIS CABRINI HOSPITAL
ALEXANDRIA, LOUISIANA

1. The VAMC Alexandria, is interested in entering into an agreement with St. Francis Cabrini Hospital of Alexandria, Louisiana, under the terms of which the VAMC Alexandria, with funding support from St. Francis Cabrini Hospital, would procure a dual energy linear accelerator, 6/21 MEV with related peripherals, the use of which would be shared with St. Francis Cabrini Hospital. The offerors agree to follow the requirements of Sections B, C. H, and L of the Federal Acquisition Regulations in reaching this agreement.

2. Further, St. Francis Cabrini Hospital, hereafter referred to as the "contributor", agrees to comply with the provisions listed below in order to be considered as a contributing partner for this advanced technology sharing program:

A. The acquisition cost of the equipment for the clinical diagnostic/therapeutic capability proposed must exceed $500,000.

B. The proposed equipment must be designed and intended primarily for diagnostic and therapeutic use in patient care. It must represent the technological state-of-the-art and be capable of serving the identified clinical needs of the community in which the sharing partner and VA facility are located.

C. Funds for procuring the equipment may be obtained from any non-VA source including community private-sector health care providers, or State, County, and municipal institutions.

D. VA appropriated funds may not be used to fund more than 50 percent of the equipment procurement cost (which may include costs of installation, and a one-year equipment maintenance contract, but not site preparation). The rest shall be obtained from (A) non-VA source(s) in a manner consistent with the Veterans Administration's authority to accept donations under 38 U.S.C. 5101, and 5103.

E. The VA investment must be recoverable in a reasonable amount of time. The VA's cost of obtaining those clinical services under this advanced technology program must be less than the projected costs of obtaining the same or similar services if the proposal were not to be approved.

F. The equipment may be installed at the VAMC, at the contributor's site, or at/on neutral property, but title to the equipment must remain with the VA.

G. If the equipment is to be located at a site other than the VAMC, such site should be sufficiently close to the VAMC to allow VA patients ready access to the site.

H. The contributor's proposal should refer to the required equipment using only generic terminology, but may include technical specifications which must be present if demands of the particular program proposal are to be met.

I. The contributor's proposal should be an inclusive, (complete, but not necessarily detailed) description of the proposed program. It should discuss the need for services, how services are to be provided, by whom, how operationg and maintenance costs, etc., are to be met, etc. It should also indicate staff (by level and number, personal services cost) committment of the contributor partner.

3. It is understood that either party may withdraw from these negotiations if done prior to the completion of a mutual use sharing agreement under 38 U.S.C. 5053 negotiated between the parties.

Signed: /s/ Dollie G. Whitehead 2/8/90

CHARLES C. FREEMAN
Director
VA Medical Center
Alexandria, Louisiana

Date

/s/ Greg Muffitt 1/30/90

GREG MUFFITT
Administrator
St. Francis Cabrini
Hospital
Alexandria, Louisiana

Date

APPENDIX E

MEMORANDUM OF UNDERSTANDING

Between VA Medical Center, Alexandria, LA

AND

St. Frances Cabrini Hospital, Alexandria, LA

This memorandum of understanding is entered into by and between VAMC Alexandria and St. Frances Cabrini Hospital to set forth the terms, conditions, and understandings of the parties with respect to the contribution of funds to the VA to be used to procure and install a Dual Energy Linear Accelerator, 6/20 MEV.

1. *Contribution of Funds.* As a contribution to the VA, St. Frances Cabrini Hospital agrees to provide the VA Medical Center by August 30, 1990, with not less than 50 percent of the acquisition and installation cost of a Dual Energy Linear Accelerator, 6/20 MEV with peripherals which VA shall procure and install at an estimated cost of $1,447,000 (list price).

2. *Procurement and Installation.* This VA procurement shall comply with all applicable requirements of Federal and VA acquisition regulations. The VAMC expects to enter into an agreement to procure this Dual Energy Linear Accelerator, 6/20 MEV by September 30, 1990. In accordance with a(n) mutual use sharing agreement to be negotiated under 38 U.S.C. 5053, the VAMC will permit the installation of the Dual Energy Linear Accelerator, 6/20 MEV in space which the St. France Cabrini Hospital agrees to prepare at its own cost.

The Dual Energy Linear Accelerator, 6/20 MEV with peripherals shall remain VA property and subject to VA control, in accordance with the provisions of a(n) mutual use sharing agreement under 38 U.S.C. 5053 to be negotiated between VAMC, Alexandria and St. Frances Cabrini Hospital even though such equipment is placed at the St. France Cabrini Hospital site.

3. *Use of the Equipment.* St. Frances Cabrini Hospital's use of the Dual Energy Linear Accelerator, 6/20 MEV shall be governed by a(n) mutual use sharing agreement under 38 U.S.C. 5053 to be negotiated between VAMC, Alexandria and St. Frances Cabrini Hospital.

4. *Authority.* VA has authority to accept this contribution under 38 U.S.C. 5101, 5103.

5. Effective Date.This memorandum of understanding shall become effective on the date of the last signature.

Signed this 8th day of August, 1990.

/s/ Charles C. Freeman — Aug 09 1990

CHARLES C. FREEMAN, Director — Date
VAMC Alexandria, Louisiana

Signed this 30th day of August, 1990.

/s/ Rene Goux — 8-30-90

RENE GOUX, Administrator — Date
St. Frances Cabrini Hospital

Supreme Court, U.S.
FILED
APR 23 1993
OFFICE OF THE CLERK

No. 92-1348

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAPIDES REGIONAL MEDICAL CENTER, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

and

ST. FRANCIS CABRINI HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

This case concerns a "sharing arrangement" entered into by a private hospital and a hospital run by the Department of Veterans Affairs under 38 U.S.C. 8153 (Supp. III 1991) for the mutual use of a sophisticated piece of medical equipment. The questions presented are:

1. Whether the court of appeals correctly determined that the sharing arrangement is not subject to the requirements of the Competition in Contracting Act, 41 U.S.C. 253, because it is not a "procurement for property or services" within the meaning of the Act.

2. Whether the court of appeals correctly determined that the sharing arrangement is not subject to the requirements of the Competition in Contracting Act because it was conducted pursuant to "procurement procedures otherwise expressly authorized by statute" within the meaning of the Act.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 974 F.2d 565. The opinion of the district court (Pet. App. A23-A27) is reported at 783 F. Supp. 1006.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1992. A petition for rehearing was denied on November 13, 1992. Pet. App. A28-A29. The

petition for a writ of certiorari was filed on February 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Department of Veterans Affairs (VA) is authorized under 38 U.S.C. 8153 (Supp. III 1991) to enter into arrangements with non-VA hospitals for the shared use of specialized medical resources in order to improve VA hospitals, to assure adequate and complete medical care for veterans, and to achieve optimum effective use of specialized medical resources under the VA's control when the VA's immediate needs do not require maximum usage. 38 U.S.C. 8153 (Supp. III 1991); see S. Rep. No. 1727, 89th Cong., 2d Sess. 11 (1966). Under this program, the VA may gain access to the specialized medical resources (including personnel) of a non-VA hospital and may also, under appropriate circumstances, allow outsiders to use specialized medical resources owned by the VA when the VA is not fully utilizing them. The VA has long used its authority under Section 8153 to enter into a wide variety of arrangements for sharing personnel and equipment with non-VA hospitals.

Since 1987, the VA has also used its Section 8153 authority to create arrangements like the one at issue in this case, whereby a VA hospital purchases specialized medical equipment using funds donated in part by a non-VA hospital. These arrangements are undertaken pursuant to the "Advanced Technology Medical Equipment Acquisition and Sharing Program." Congressional committees had encouraged such sharing arrangements in various legislative reports. See S. Rep. No. 129, 99th Cong., 1st Sess. 88-

89 (1985); H.R. Rep. No. 363; 99th Cong., 1st Sess. 22 (1985).

The sharing program plays an important role in allowing the VA optimum access to specialized medical equipment for the treatment of veterans. As the congressional reports noted, "[t]he establishment of this new mechanism * * * help[s] the VA to acquire costly, advanced state-of-the-art medical equipment more easily and * * * provide[s] a means of using that equipment to maximum effectiveness by encouraging long-term sharing with community institutions." S. Rep. No. 129, *supra*, at 89. By arranging for non-VA hospitals to pay 50 percent of the cost of such equipment, the VA virtually doubles the purchasing power of its budget.

2. The VA operates the Alexandria Veterans Affairs Medical Center in Rapides Parish, Louisiana. Pet. App. A2. Some cancer patients there require radiation therapy, which often entails the use of a sophisticated medical device known as a linear accelerator. Lacking a linear accelerator of its own, the VA hospital had contracted for radiation services with petitioner, which owned the only high-energy linear accelerator in the area. Pet. App. A2 n.2. By late 1989, the VA thought that petitioner was charging too much for radiation services. Accordingly, the VA began to explore ways of developing an alternative source of these services. *Ibid.*

VA officials learned that another hospital in Rapides Parish, respondent St. Francis Cabrini Hospital (Cabrini), was planning to acquire a linear accelerator. Pet. App. A2 n.2. In December 1989, the VA began discussing with Cabrini the possibility of participating in the VA's sharing program. These

discussions resulted in an August 1990 "Memorandum of Understanding" between the VA and Cabrini, which provided: (1) that the VA and Cabrini would each advance half the cost of a linear accelerator (about $750,000 each); (2) that the VA would acquire an accelerator, following all applicable procurement laws; (3) that the accelerator would be wholly owned by the VA; (4) that the VA would allow the accelerator's installation at Cabrini in space that Cabrini would provide at its own expense; and (5) that the use of the accelerator would be governed by an agreement which the VA and Cabrini would execute at a later date. Pet. App. A24, A34-A35.

3. Early in 1990, petitioner learned of the discussions that the VA and Cabrini were having and endeavored to block the sharing agreement. Hospital officials wrote numerous letters to officials at the VA, to members of Congress, and to the President, arguing that the acquisition of another accelerator in Rapides Parish would be duplicative and unnecessary and would drive up the cost of medical care. Pet. App. A2, A12 n.12.

On January 29, 1991, petitioner also filed a protest regarding the VA-Cabrini plan with the Comptroller General. Petitioner claimed that the VA's actions violated the requirements of the Competition in Contracting Act (CICA), 41 U.S.C. 253. The Comptroller General dismissed the protest as untimely, noting that the applicable regulations require a protest to be filed within ten working days after the basis for the protest is known. *Rapides Regional Medical Center*, No. B-242601, 91-1 C.P.D. ¶ 159 (Feb. 12, 1991).

Petitioner sought reconsideration of its protest. The Comptroller General denied the request for reconsideration. In addition to reaffirming the finding that the protest was untimely, the Comptroller General noted that sharing agreements negotiated under 38 U.S.C. 8153 (Supp. III 1991) are not subject to the competition requirements of the CICA, because they are "otherwise expressly authorized by statute," within the meaning of 41 U.S.C. 253. *Rapides Regional Medical Center—Reconsideration*, No. B-242601.2, 91-1 C.P.D. ¶ 614 (June 28, 1991).

4. a. Petitioner filed suit against the VA in the United States District Court for the Western District of Louisiana on July 29, 1991. Petitioner alleged that the VA-Cabrini plan violated the competition requirements of the CICA. Cabrini later intervened as a party defendant. Pet. App. A3. The district court held that the CICA had been violated and issued a permanent injunction against the implementation of the VA-Cabrini agreement. Pet. App. A26.

b. The VA and Cabrini both appealed. A unanimous panel of the Fifth Circuit reversed the judgment and vacated the injunction. Pet. App. A22. The court held that the arrangement between the VA and Cabrini was not a "procurement" within the meaning of the CICA because it did not involve the government's paying money (or granting some other benefit) in return for the receipt of property or services. Rather, it involved granting the right to use government property. Hence, the transaction was more analogous to a lease or sale of government property than to a procurement by the government.

Pet. App. A13-A19. The CICA does not govern sales or leases of government property. Pet. App. A13 n.15.

Even assuming that the challenged arrangement constituted a "procurement" within the meaning of the CICA, the court held that sharing arrangements entered into under 38 U.S.C. 8153 (Supp. III 1991) are not subject to the CICA because they are "otherwise expressly authorized by statute." Pet. App. A19. The court noted that Section 8153 provides for administrators at the two hospitals concerned to work out an appropriate reimbursement rate for the use of the shared equipment, a procedure that is inconsistent with the competition requirements of the CICA. Pet. App. A20. The court also noted that the VA and the Comptroller General have approved the practice of negotiating sharing arrangements under Section 8153 without competitive bidding. Pet. App. A20-A21, A21 n.24.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The VA-Cabrini sharing arrangement is not subject to the CICA because it is not a "procurement" within the meaning of the Act. As the court noted, the term "procurement," although not defined in the statute, is generally understood to refer to the process by which the government pays out money (or confers some other benefit) in return for the receipt of property or services. Under the arrangement challenged here, the government received money and in return granted a private party the right to use

government property. Accordingly, as the court held, the arrangement is closely analogous to a lease or sale of government property, not to a procurement of property or services by the government.

The CICA does not regulate leases or sales of government property. See, *e.g.*, *Crystal Cruises, Inc.*, No. B-238347, 90-1 C.P.D. ¶ 141 (Feb. 1, 1990) (granting of national park concession permit not a procurement); *Columbia Communications Corp.*, No. B-236904, 89-2 C.P.D. ¶ 242 (Sept. 18, 1989) (lease of right to use government satellite not a procurement); *Jefferson Bank & Trust*, No. B-228563, 87-2 C.P.D. ¶ 390 (Oct. 23, 1987) (leasing of government-owned office space not a procurement); *Surface Alloys Corp.*, No. B-222703, 86-2 C.P.D. ¶ 7 (June 25, 1986) (Navy's provision of sophisticated piece of scientific equipment to government contractor not a procurement). That is not to say, of course, that leases or sales of government property are entirely unregulated; they are simply not regulated by the CICA.

Petitioner mischaracterizes the VA-Cabrini agreement as a procurement by focusing on something it does not contain: an agreement for Cabrini to provide radiation therapy *services* to VA patients. Pet. 1-2, 26-27. The challenged agreement provides only that the VA will purchase an accelerator, and that in return for donating funds Cabrini will have access to the use of the accelerator. It does not provide that Cabrini will furnish radiation therapy services to the VA. The actual procurement in this case was of the linear accelerator from its manufacturer. That procurement complied with all applicable laws, and petitioner does not suggest otherwise.

2. Even were the sharing arrangement a "procurement," the competition requirements of the CICA would not apply, because the procurement was undertaken pursuant to procurement procedures "otherwise expressly authorized by statute." 41 U.S.C. 253. The court of appeals correctly held that VA sharing arrangements under 38 U.S.C. 8153 (Supp. III 1991) would fall within this exception to the CICA.

a. Section 8153 authorizes the VA to enter into arrangements with non-VA hospitals for the shared use of personnel or equipment. The VA has made extensive use of this authority during the 27 years of Section 8153's existence, forming close working relationships between VA and other hospitals. During this time, the sharing program has proceeded on a noncompetitive basis, with factors such as the maintenance of cooperative relationships taking precedence over pure cost considerations. If petitioner's argument were correct, it would disrupt not only arrangements such as the one at issue here, involving the acquisition of new equipment, but also arrangements between VA and private hospitals for the shared use of existing equipment or personnel, which have proceeded without controversy on a noncompetitive basis for nearly three decades.

The historical practice of negotiating sharing arrangements noncompetitively is authorized by Section 8153, and in particular by Section 8153(b). The statute grants very broad discretion to the Secretary of Veterans Affairs, permitting a sharing arrangement "when the Secretary determines it to be in the best interest of the prevailing standards of the Department medical care program." 38 U.S.C. 8153

(Supp. III 1991). Section 8153(b) states that sharing arrangements will provide for reciprocal reimbursement between the hospitals concerned for the use of shared resources. But the statute does not provide that the reim-bursement rates will be determined by competition. Instead, it states that the reimbursements shall be

> based on a methodology that provides *appropriate flexibility to the heads of the facilities concerned to establish an appropriate reimbursement rate* after taking into account local conditions and needs and the actual costs to the providing facility of the resource involved.

38 U.S.C. 8153(b) (Supp. III 1991) (emphasis added).

As the court of appeals held, that statutory provision is inconsistent with the theory that, in entering into a sharing arrangement, the Secretary must attempt to achieve the greatest possible reimbursement to the VA by using competitive bidding. Pet. App. A20. When the VA allows a non-VA hospital to use its resources, the reimbursement it receives must plainly be determined by "the heads of the facilities concerned" under a method that allows them "appropriate flexibility." 38 U.S.C. 8153(b) (Supp. III 1991). The reimbursement will be determined by a procedure of negotiation between the heads of the facilities concerned, not by competitive bidding procedures. Noncompetitive procedures are therefore "otherwise expressly authorized by statute" within the meaning of 41 U.S.C. 253.[1]

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[1] The court of appeals properly noted that other indicators of congressional intent confirm that Section 8153 authorizes VA

b. To the extent that there is any ambiguity in 38 U.S.C. 8153, the matter should be resolved by deferring to the opinion of the VA and the Comptroller General. The VA has by regulation expressed its view that Section 8153 authorizes sharing arrangements to proceed noncompetitively. See 48 C.F.R. 806.302-5(b). As the court of appeals held, this interpretation of the statute by the agency charged with its administration is a reasonable one. Pet App. A21. It therefore is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioner mistakenly characterizes the regulation as the VA's attempt to exempt itself from the CICA. Pet. 4, 21. The regulation is not itself the authority that exempts sharing arrangements from the CICA, but rather it is the VA's reasonable interpretation of Section 8153, which is the statute that satisfies the CICA's exception for procurement procedures that are "otherwise expressly authorized by statute." 41 U.S.C. 253.

In addition, the Comptroller General, both before and after passage of the CICA, has expressly recognized that the VA is authorized to enter into Section 8153 sharing arrangements on a noncompetitive basis. In *Veterans Administration*, No. B-195559.2, 81-2 C.P.D. ¶ 369 (Nov. 2, 1981), the Comptroller General held that sharing arrangements were properly negotiated without adherence to pre-CICA

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sharing arrangements to proceed noncompetitively. See, *e.g.*, Pet. App. A19-A20 (reporting requirement). But the main and sufficient indicator of Congress's intent is the language of Section 8153.

competition procedures. More recently, in this case, the Comptroller General confirmed that sharing arrangements under Section 8153 are exempt from the CICA because they are "otherwise expressly authorized by statute." *Rapides Regional Medical Center—Reconsideration*, No. B-242601.2, 91-1 C.P.D. ¶ 614 (June 28, 1991) ("[t]he Competition in Contracting Act of 1984 * * * specifically exempts from full and open competition procurement procedures otherwise expressly authorized by statute, such as here").

The courts of appeals have held that the Comptroller General's expertise in the highly technical field of government procurement makes his opinion worthy of considerable weight. See *Shoals American Industries, Inc.* v. *United States*, 877 F.2d 883, 888-889 (11th Cir. 1989); *B.K. Instrument, Inc.* v. *United States*, 715 F.2d 713, 729-730 (2d Cir. 1983); *J.H. Rutter Rex Mfg. Co.* v. *United States*, 706 F.2d 702, 711 (5th Cir.), cert. denied, 464 U.S. 1008 (1983); *Kinnett Dairies, Inc.* v. *Farrow*, 580 F.2d 1260, 1271 (5th Cir. 1978) (quoting *Hayes Int'l Corp.* v. *McLucas*, 509 F.2d 247, 258 (5th Cir.), cert. denied, 423 U.S. 864 (1975)); *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1298-1301 (D.C. Cir. 1971). Where, as here, the Comptroller General and the executive agency involved agree that a transaction is proper, courts should be hesitant to intervene. *Kinnett Dairies*, 580 F.2d at 1272.

There is no conflict in the circuits on this issue. Petitioner cites no case that supports its view that VA sharing arrangements are subject to CICA competition requirements. Petitioner erroneously compares this case to *Andrus* v. *Glover Construction Co.*,

446 U.S. 608 (1980). In that pre-CICA case, the government, in awarding a road construction contract, had relied on the exception to pre-CICA competition requirements that allowed procurement to proceed by means other than advertising when such means were "otherwise authorized by law." See *id.* at 615 (quoting 41 U.S.C. 252(c)(15)). The Court noted, however, that a specific provision of the pre-CICA statute made the "otherwise authorized by law" exception inapplicable to road construction contracts, 446 U.S. at 615, and so that exception could not validate the contract at issue.

Glover Construction is plainly inapposite here. This case concerns the exception to the CICA for procurement procedures "otherwise expressly authorized by statute." 41 U.S.C. 253. In contrast to *Glover Construction*, no other part of the CICA makes that exception inapplicable to this case. The court of appeals properly found that 38 U.S.C. 8153 (Supp. III 1991) provides the necessary statutory authorization for the VA's sharing program to be conducted on a noncompetitive basis.[2]

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[2] Petitioner also alleges a conflict between the court of appeals' opinion and the opinion of this Court in *Ex parte Endo*, 323 U.S. 283 (1944), with regard to the effect to be given to appropriations legislation. But the court of appeals did not hold that appropriations legislation is the source of the VA's exemption from CICA; it merely referred to an appropriations bill as something that helped to explain the VA's regulations. See Pet. App. A21. In any event, the court's reference to appropriations legislation is no more than a mere detail in its opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1993